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Received Mar. 7, 1900.

VOL. X.] [PART IV.

REPORTS OF CASES

DECIDED IN

THE EASTERN DISTRICT COURT

OF THE COLONY OF THE

CAPE OF GOOD HOPE,

Court of the Eastern District of Cape Colony in Reports of

REPORTED BY

ROBERT M. KING,

OF THE KING'S INN, DUBLIN, BARRISTER-AT-LAW.

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South 503

J. C. JUTA & CO.,

CAPE TOWN | PORT ELIZABETH

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EASTERN DISTRICTS' COURT REPORTS.

VOL. X.

PART I.

DIVISIONAL COUNCIL OF ALBANY *vs.* LOMBARD AND OTHERS.

Outspan—Servitude—Proprietor—Grant.

Where a grant of land contains a clause providing "that all roads and thoroughfares running over the land shall remain free and uninterrupted, as well as the outspan place laid down on the diagram," this merely reserves a servitude of outspan in favour of the travelling public, and does not vest the ownership of the outspan in the Government or their successors, the Divisional Council. The owner of property who has granted a servitude of outspan of this description on it retains the right of grazing his own stock, or stock in his lawful custody or possession, on the outspan at all times, provided he leaves sufficient pasturage for the use of the person or persons in whose favour the servitude is granted.

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Divisional Council of Albany *vs.* Lombard & Others.

This was an action for a declaration of rights, brought by the Divisional Council of Albany against Jacobus Fredrik Lombard, Hermannus S. Lombard, and William P. Botha, the registered owners of the farm Wentzel Koester.

The plaintiffs' declaration stated that this farm, Wentzel Koester, was granted to the defendants' predecessor in title,

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Abraham Jacobus Espach, on the 1st November, 1833; that previous to this grant Espach, being in possession of this farm, petitioned the Crown for the grant of a piece of land as an equivalent for the land used, and afterwards, in the deed of grant of Wentzel Koester, set aside as an outspan, and that in 1851 the Crown granted to Jacobus Fredrik Lombard, a successor in title to the said Espach, a piece of land measuring 507 morgen in consideration of the outspan place allowed on the said farm; by the aforesaid deed of grant the said outspan place was to be free and uninterrupted, and in consequence of the foregoing the plaintiffs claimed that they were the occupiers of the outspan, with the right to prevent defendants' cattle and live-stock from coming on the outspan, except when defendants were *bonâ fide* travellers, and also with the right to let portions of it according to law; further, that immemorially for more than fifty years the Crown, and after it the plaintiff Council, as successors in that behalf, have continuously, and as against defendants and their predecessors in title, claimed and used the said outspan as a public outspan with a right of letting portion of it; the defendants, nevertheless, since the year 1890, have claimed, and still claim, a right in themselves to use the said outspan when not travelling, and have driven large herds of cattle and live-stock upon the said outspan to graze thereon, and have thereby destroyed and greatly diminished the pasturage thereon, to the great detriment of the public, and contrary to the true intent and meaning of the aforesaid grants. The plaintiffs claimed a declaration of rights, and a perpetual interdict against the defendants and their successors in title, restraining them from destroying the pasturage upon the said outspan, and from driving or grazing cattle and stock thereon when not *bonâ fide* using the said outspan place as such.

The defendants pleaded that the farm Wentzel Koester was granted to A. J. Espach, and afterwards in 1884, by an amended title (under Act 9 of 1879), to J. F. Lombard, both predecessors in title of defendants, and that both grants were made subject to the servitude or condition that all roads and thoroughfares running over the land should remain free and uninterrupted as well as the outspan place laid down on the diagram; that defendants have at all times

granted to plaintiffs and the general public the free use of the outspan in terms of this servitude, and have never objected to the plaintiffs letting a limited portion of the ground, together with a limited right of grazing for the purposes of a house of accommodation; but notwithstanding this the defendants have at all times exercised their common law rights over the said outspan as being their property, but subject to the said public right of outspan. The other allegations in the declaration were denied.

From the evidence led by plaintiff it appeared that on the 1st November, 1833, the farm Wentzel Koester, containing (according to the grant) 3000 morgen, was granted to Abraham Jacobus Espach on condition, *inter alia*, that all roads and thoroughfares running over the land should be free and uninterrupted, as well as the outspan place laid down on the diagram. In 1851 the Crown granted to Jacobus Fredrik Lombard (successor in title to Espach) 507 morgen of land in the same division "in consideration of an outspan place having been allowed on the farm Wentzel Koester, now the property of grantee."

[At this stage plaintiffs' counsel wished to put in a petition from Abraham Espach to the Crown dated 1831, and subsequent correspondence, to show on what terms the outspan was given over, quoting *Van Breda* vs. *Cape Town Council*, 9 Jut. 415; but this evidence was disallowed on the ground that there was no ambiguity in the grant requiring explanation.]

In 1884 an amended title of the farm was granted to Lombard's successor in title under the provisions of Act 9 of 1879, subject to the same condition. The farm had since been divided between the three defendants, Lombard being allotted the portion adjoining the outspan; the outspan itself was not included in the division, but was registered in the name of the three defendants. About 1843 Government leased a portion of the outspan to one Simpson, now deceased, for the purpose of keeping a house of accommodation, allowing him to run a limited quantity of stock on the outspan. He continued there till 1850, when his lease was taken over by William Kemp. Kemp deposed that when he went there Mr. Lombard, father of the defendant Lombard, and then sole owner of Wentzel Koester, came and asked him if he would live on the same friendly terms that

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Simpson had lived on with him, namely, that he should not impound Lombard's cattle when trespassing on the outspan, and that Lombard should not impound the outspan cattle when trespassing on his land; this was agreed to. Kemp continued in occupation till 1856, and was succeeded by one Thomas; and again in 1866 the Colonial Government leased the house of accommodation to John O'Grady, with limited rights of grazing on the whole outspan. His occupation lasted till about 1880, when the place was disused as a house of accommodation, and was afterwards made use of as a police camp. There was evidence that while the police were in occupation Lombard's cattle were occasionally impounded when trespassing on the outspan, especially after 1885, when more stringent orders were given to the police, but only three definite acts of impounding were proved, and the pound-book from 1886 to 1891 only showed one instance of Lombard's stock being impounded. There was also evidence that at night large quantities of sheep and cattle belonging to Lombard used to be driven on the outspan and taken away early in the morning, so as to escape the notice of the police, and that the grass on the outspan used consequently to be eaten up and destroyed.

[*Maasdorp, S.A.* (with him *Hutton*), for defendants, asked for absolution from the instance; this was refused, but the Court, after hearing counsel for plaintiffs, intimated that no rebutting evidence on the question of prescription need be called.]

For the defence evidence was led showing that the use of the outspan by Lombard's cattle was reasonable and consistent with the use of the public, that the outspan was not much used, and that there was always sufficient pasture on it for the travelling public, except in times of drought, and that then it was in no worse condition than the surrounding farms.

Sampson (with him *King*), for plaintiff: The grant provides that the servitude shall be free and uninterrupted; this means that the public are to have the entire use of it, and that the Divisional Council, as representing the public, can restrain the defendants' cattle from trespassing on it. When a specific piece of ground is set apart and dedicated to the use of the public, it is more than a mere servitude in

their favour, even if the *dominium* has not absolutely vested in the Divisional Council. In any case defendants' user of it has been unreasonable and detrimental to the interests of the public.

Maasdorp, S.A. (with him *Hutton*), for defendants: The grant merely creates a servitude, and our common law rights remain as a matter of course. Act 11 of 1893 merely gives a further confirmation to them. There is no evidence of unreasonable user.

Cur. adv. vult.

Posteà (August 22).

BARRY, J.P.: The farm Wentzel Koester was originally a request place and was on the 1st November, 1833, granted to A. J. Espach, the deed of grant providing "that all roads and thoroughfares running over this land shall remain free and uninterrupted as well as the outspan place laid down on the diagram." This diagram annexed to the grant represents the area exclusive of the outspan to be 2700 morgen, and the outspan marked and drawn upon it to be 300 morgen. Of this farm the defendants are the proprietors. The declaration states that previous to the issue of the grant, Espach, then in possession of the farm, petitioned the Crown for a grant of a piece of land as an equivalent for the land set aside as an outspan. Whether this be true or not it is certain that on the 1st July, 1851, the Crown granted to J. F. Lombard, now dead, and Espach's successor in title, a piece of land measuring 507 morgen adjoining the farm Wentzel Koester "in consideration of an outspan place having been allowed on the place Wentzel Koester, now the property of the grantee." On the 12th November, 1884, a new title, under the Land Beacons Amendment and Extension Act of 1879, was granted to the legal representative of the then deceased J. F. Lombard, showing the true area of the farm to be 3807 morgen; this included the outspan which is laid out on the diagram annexed to the new title with the following N.B.: "There is a servitude for an outspan on this portion which contains 471 morgen." The declaration states that from 1833 up to the present time, the Crown first and then its successor, the plaintiff

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Council as against the defendants and their predecessors in title, claimed and used this outspan as a public outspan, especially the right of letting portion of it during that period to the knowledge of defendants and their predecessors, and that the true meaning of the word outspan place in the deed of grant carries with it the right in the plaintiff Council of letting portion of it, and further that for more than the period of prescription the Crown and the plaintiff Council continuously as against the owners of the farm claimed and used this outspan as a public outspan, and the prayer is that the outspan be declared a public outspan and that plaintiffs be declared to have a right to let a part of it. There is a second count in which it is alleged that by grant this outspan is to be free and uninterrupted, and that by law the plaintiff Council is the occupier of this outspan with a right to prevent defendants' cattle and live stock from coming on it except when defendant is a *bonâ fide* traveller, but that defendants between 1890 and the present time, notwithstanding plaintiffs' protests, pretended to a right when not travelling to drive and have driven cattle and live stock upon the outspan to the detriment of the public, and there is a prayer (a) for a declaration of rights, (b) for a perpetual interdict restraining defendants and their successors in title from destroying the pasturage and driving stock thereon when not *bonâ fide* using it as an outspan. From this it will be seen that the plaintiffs contend that they have a right to exclude the defendants from the outspan except they come there as *bonâ fide* travellers. The defendants in their pleas say that the grant was made subject to an outspan servitude, which they have always allowed to the public and to the plaintiff Council, who have under this servitude from time to time let a limited portion of the outspan for the purpose of a house of accommodation, together with a certain limited right of grazing, to which leases defendants have never objected, but, notwithstanding them, have at all times exercised their common law rights over the outspan as being their property, but subject to the public right of outspan.

From these pleadings the substantial issue raised between the parties is whether the plaintiffs have a right to exclude the defendants, except as *bonâ fide* travellers, from the use of this ground, and the question of the plaintiffs' right to let a limited portion of it for the purposes of a house of accom-

modation with a certain limited right of grazing is not the issue; nor do I think this action was brought in consequence of any abuse of the servitude rights of the public and the Council by defendants driving their cattle upon it so as to interfere with the public rights of pasturage. The defendants may be excluded by grant or by prescription. It seems by the evidence and correspondence, as well as the summons, that the plaintiff Council, when they commenced this action, claimed the *dominium* or right of property in this outspan, but also, in case this be not allowed, the right to exclude the defendants from using it except as travellers. This claim of the plaintiff Council is evidently based upon the provisions of sect. 207, Act 40 of 1889, which provides that all public outspans shall be under the management and control of the Divisional Council, which may, with the Governor's consent, let a portion not exceeding one morgen with a limited right of grazing over the remainder, subject to conditions for the erection of buildings for accommodation of travellers for a period not exceeding seven years. If this section had contained the whole law upon the subject of outspans the plaintiffs' contention that the defendants have no better right of use than the travelling public would perhaps be countenanced by some show of authority; but in support of the defendants' contention there is the grant which vests in them the *dominium* of the outspan, and also the common law, by which the owner of land who has granted a servitude "*pecoris pascendi*" retains the right of grazing his own stock, as long as he leaves sufficient pasturage for the use of the person in whose favour the servitude is granted (*Voet*, 18, 3, 11); and further Act 11 of 1893, sect. 3, which provides that it shall not be lawful for any Divisional Council to let or lease any portion of any private land which shall be subject to a registered servitude of outspan, while sect. 4 provides that the powers of impounding, conferred by sect. 50 of the Pound Act of 1892, shall not extend to any animals belonging to or in the lawful custody or possession of the occupier of any land which is subject to a registered servitude of outspan. That Act (15 of 1892) provides that, among others, members of the Divisional Council, or persons authorized by them in writing, may impound any animals found upon any outspan place or vacant Crown land in the division. These words, "any outspan

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place," coupled with the provisions of sect. 205, Act 40 of 1889, already quoted, had given some countenance to the contention that a Divisional Council might exclude the owner of land subject to an outspan servitude from running any of his stock there, even if by doing so he did not prejudice the grazing rights of the travelling public. Possibly, had Act 11 of 1893 not come into operation, owners of property might have yielded to a continuous claim by Divisional Councils during the period of prescription to exclude the registered owners of property from any grazing rights except as travellers over such outspans; but with the common law as it always has been, and the provisions of Act 11 of 1893 before us, there can be no right in the plaintiff Council absolutely to exclude the defendants' stock as such from coming on to and grazing on the outspan, the property in which is in the defendants by grant; nor has that property or their right of use, subject to the servitude, been disturbed by proof of prescription. The evidence upon this latter point of prescription does not prove prescriptive right to exclude defendants' stock. It at most shows that on a few occasions the plaintiffs have exercised the right to impound the stock of one of the defendants. This, however, was not a right exercised throughout the period of prescription; nor was it yielded to, and certainly not throughout that period. Neither by grant nor by prescription are the plaintiffs entitled to the declaration sought. But it was also contended in argument that the evidence proved that the cattle of one of the defendants, J. F. Lombard, in grazing on the outspan, stripped it of all grass, and thereby abused what might have been his right to use such grass as was not required by the travelling public. Here again there is no proof of such abuse; the evidence at most shows that during drought the outspan is stripped of grass, but this absence of grass was not due to the presence of the stock of any of the defendants, but to the drought, and therefore, even if this alternative claim had been the real issue, the plaintiff Council have not succeeded in proving any invasion of the rights of the public by any of the defendants. As the property has been subdivided, and the defendants do not have their stock in common, the plaintiffs must have failed against the second and third defendants, seeing that their stock do not graze on the outspan. All the defendants, however, are

entitled to absolution with costs. It is not necessary to express any opinion upon any right in plaintiffs to reserve a morgen of land for a house of accommodation. A house existing on the property was formerly used as a house of accommodation, but for some years past it has not been so used, and it appears that while the plaintiff Council now attempts to cover its retreat by imputing to defendants an abuse of its right of use, the Council itself has recently attempted to let the whole of the outspan as a farm without consulting the convenience of travellers, and in a manner which would actually have prejudiced the travelling public and their animals. Our judgment is absolution from the instance, with costs; in this judgment Mr. Justice JONES, who is unable to be present, concurs.

[Plaintiffs' Attorney, G. G. WRIGHT.
Defendants' Attorneys, BELL & HUTTON.]

QUEEN *vs.* MAHLAMENI.

Sect. 75, *Act* 28 *of* 1883—*Sale of Liquor—Evidence—Trap.*

A conviction for selling liquor without having a license set aside, when the sole evidence of the sale was that of a trap, and the circumstances were such as to render this evidence unreliable.

Appeal from a decision of the Resident Magistrate of Cathcart.

The appellant, a native woman called Mahlameni, had been convicted of contravening sect. 75, Act 28 of 1883, in that on the 6th June, 1895, at Inverthomas, in the district of Cathcart, she did sell to one Boleni two bottles of brandy, for the sum of five shillings, without having the license required by law.

In the Magistrate's Court Boleni swore that he lived some four miles from accused's hut, and on the morning of the 5th June two native policemen, called Tom and Skali, came to him and asked him to trap accused, giving him five shillings to buy brandy from her. He was employed because he was a stranger to accused. Accordingly, early on the morning of the 6th he went to a hut on a farm at Inverthomas and found accused there, together with several natives (whom he

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enumerated) drinking beer. He asked accused to sell him some brandy, and she went out of the hut to a store-hut alongside and, unlocking the door, went in and brought him out two bottles of brandy, for which she received in payment the five shillings given him by Tom and Skali. He left the hut, and about three or four hundred yards from it met Tom and Skali, to whom he gave the two bottles of brandy; Skali then went back to watch accused's hut, while he (Boleni) with Tom brought the brandy to the police camp, when it was handed to Private Warner. He denied having ever known accused before, or having had a quarrel with her, or that she told him on this occasion to tell other people that she had brandy for sale, but admitted having made an affidavit in which this latter statement was made.

Tom and Skali corroborated Boleni's statement that they had employed him as a trap, and had met him about four hundred yards from the hut on the morning of the 6th, and added that they had promised him something "if the case was a successful one." Other witnesses for the Crown deposed that Boleni and accused were known to one another, and that they had heard there had been a quarrel between hem. Private Warner gave evidence that, after receiving the brandy on the 6th, he had proceeded to accused's hut, but had not searched either her or the premises, as she refused to unlock the store-hut; but on cross-examination he admitted that she had told him he might take the keys on his own responsibility, and had finally unlocked the store and produced some Kafir beer, which he and the two other policemen drank.

For the defence the accused gave evidence and denied the charge, and described a previous quarrel between herself and Boleni about some reeds for thatching. Several other witnesses were called who had been drinking beer at accused's hut on the morning of the 6th (including two of those enumerated by Boleni), and all denied having seen Boleni there that morning.

Accused was convicted and fined £25, or three months' imprisonment.

King, for appellant: The evidence does not support the conviction; the only evidence of a sale was that of a trap, and this, though not necessarily insufficient, should be looked

at with suspicion, and tested by all the facts of the case. Here a trap was selected who had a grudge against accused, and a promise of reward was made in case he succeeded: then a whole day was given to him to arrange his plans. Besides, on at least two points his evidence was contradicted either by himself or other Crown witnesses; and no attempt was made to test his story by searching either for the money or for other brandy on accused's premises. This evidence was not enough to outweigh the witnesses for the defence, or the legal presumption in favour of the prisoner's innocence. It is true the magistrate in his reasons says that after a careful consideration he believed the witnesses for the prosecution in preference to those for the defence, but even when the case rests on a direct issue of fact—*i.e.*, on the relative credibility of evidence—the Court, if it thinks the Magistrate's decision wrong, will reverse it. *Q.* vs. *Diedrich & Another*, 3 H. C. 359; *Q.* vs. *Bitterbosch & Others*, 3 H. C. 495; *Van Reenen* vs. *Manuel*, 9 Jut. 249.

Maasdorp, S.-G., for the Crown: There is evidence to support the conviction, and the Magistrate believed it. Boleni's evidence is sufficient, but he is also corroborated as to having been at the hut and seen people there drinking beer by these very people when called for the defence.

Cur. adv. vult.

Posteà (Aug. 22).

BARRY, J.P.: This is an appeal from a conviction of the appellant in the Court of the Resident Magistrate of Cathcart upon a charge of selling to one Boleni, on the 6th June last, two bottles of brandy for 5*s.* without having a license. The question is one of fact, and the proof of sale depends entirely upon the credibility of one Boleni, a native detective, who says that upon the 5th June he obtained 5*s.* from two native policemen for the purpose of trapping the accused, an old woman living near the Kei River, who was suspected by them of selling brandy. Boleni says that on the following morning, the 6th June, he started, alone, for the hut of accused, when he found a number of natives drinking Kafir beer; that he there spoke to accused, and asked her in a low voice to sell him some brandy; whereupon she went out to a little store near the

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hut, which she unlocked, went in, and came out with two bottles of brandy, for which Boleni paid her 5*s*., and with which he went off to meet these two policemen, who were waiting for him some four hundred yards off, and handed them the bottles, with which one of the police went over to a European policeman, Private Warner, while Boleni and the other policeman went to the police camp, and also, subsequently, the same day met at prisoner's hut. There is evidence that Boleni was seen starting that morning without any bottles, and these policemen support his statement that he came to them with two bottles of brandy. The police add that when they went soon after to accused's hut she refused to open her house. From the cross-examination of the witnesses for the Crown it appeared, however, that early on the morning of the 5th the two native police had told Boleni that if the case was a successful one he would receive something, and there was no marking of the coins handed to Boleni, nor search for any on the accused. Further, while Boleni says in his evidence in chief that he was sent to trap because he was a stranger, from evidence on both sides it appears that he was known to the accused, and had had a dispute with her before about some reeds or thatching, although Boleni positively denied that he had ever had such a disagreement. Moreover, while Boleni, in cross-examination, denied that the accused ever asked him to tell others that she had brandy, we find that from his affidavit on which the charge was based he had sworn that accused told him to let people know that she would sell brandy to them privately. It, moreover, appears from the cross-examination of the European policeman that accused told him at her hut that he could take her keys on his own responsibility, that she unlocked the hut and took out some beer, which she gave to the police who came there to examine into this matter, and who willingly drank it. From the evidence for the defence it further appeared that when the police asked her for her keys she put them on the ground, and said, "There they are, take them," and when they did not, she opened the door and gave them some beer. Several of the persons who were drinking beer in accused's hut were called, but deny that Boleni had been there that day, before he came with the policemen.

In these circumstances we think that the conviction cannot be sustained. Boleni was employed to trap, and although this in itself does not impeach his credibility, those who employed him should have watched him from the time he received the money to trap with, so as to prevent the trap having the opportunity of taking the brandy to the spot where, on the following day, they received the brandy from him. There was no attempt to mark the money or to search for it after the supposed sale. In such circumstances the statement of the trap can have but little weight when contradicted by the accused and by those who were in her hut. Boleni moreover was not merely a trap, but was to be paid only if successful, which in itself is a strong inducement to such a man to invent evidence. In addition to this, while he pretends to have been employed because a stranger to the old woman, he was actually well known to her, and bore her some grudge. Boleni has moreover contradicted himself upon the points already mentioned, and is contradicted by credible evidence upon matters not irrelevant to the issue. The police who employed him have throughout in this matter neglected the most ordinary precautions to safeguard the trap's evidence, and from their conduct at accused's hut and their attempt to make it appear that she refused to allow any search, when in reality there was not an absolute refusal, and still no attempt was made to search either for brandy or the money, we must come to the conclusion that the evidence for the Crown is of a most unreliable character. Without coming to the conclusion that Boleni's evidence is absolutely false, we think the prisoner should have been acquitted because his evidence was, in the circumstances, unreliable and tainted with untruth. The Crown cannot seek a conviction where there is a reasonable doubt as to guilt, and such a reasonable doubt unquestionably exists in the present case. I may add that the casual employment of native detectives, whose payment depends upon results, is such a vicious practice that it should be discountenanced in every possible way; and although the case before us may not be said to be a typical example of the evil effects of such a practice, cases may arise in which discredit will be brought upon the administration of justice by the employment of such agencies. It is better that even guilty men should sometimes escape than that the innocent should be

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exposed to the possibility of conviction upon such tainted evidence. If detectives are to be employed, let every precaution be taken that their evidence be corroborated, for unless there is such corroboration Courts would wisely hesitate to accept their statements as true. The conviction and sentence in this case will be quashed. I should add that my brother JONES, who is unable to be present, concurs in this judgment.

[Appellant's Attorneys, BELL & HUTTON.]

HALSE BROTHERS *vs.* ENGLISH COUNTY COLONIZATION ASSOCIATION.

Contract—Lease—Breach of Contract—Damages—Improvements.

Where land was held in allotments by certain settlers subject to a fixed rent payable by the settlers under a contract between the owners of the land and an Association who brought these settlers out as immigrants and assisted in the management of the settlement, and by a later contract the Association agreed to guarantee the payment of this rent and, as they said, practically to rent the whole settlement, Held, *that the Association were not bound by certain regulations which the original contract made binding on the settlers, some of these regulations being manifestly inapplicable.*

Where defendants leased land for three years at a rent of £400 *a year, agreeing to keep the land in proper order, and at the end of one year broke this contract and gave back the land not in proper order, and it was proved that the lessor (who sued defendants for damages for breach of contract) could make and was likely to make* £700 *a year out of the land for the two unexpired years, but that he could have made* £1400 *a year if the land had been restored in proper order,* Held, *that plaintiff was not entitled to receive as damages for breach of contract the difference between* £700 *and* £1400 *for each of the two years, nor was defendant entitled to set off plaintiffs' increased gain for the two years against the sum necessary*

to be expended on putting the lands in order, but that the proper measure of damages to be allowed was the sum which the plaintiff would have to lay out in putting the land in good order.

Where a contract of lease was entered into between the owner of land and a lessee, and part of the contract was that certain permanent improvements should be erected on the land leased, and subsequently an Association who had taken over all the rights and liabilities of the lessee under the original contract agreed to take the land on lease for three years, and at the end of one year broke this agreement and handed back the land, Held, *that the Association were not entitled to set off against the damage suffered by the lessor the benefit which he received from these permanent improvements being erected on his land.*

Where a lessee contracted for the renewal to him of the lease of a certain portion of land, excepting four allotments which were to be taken back by the lessor, who, in consideration of taking them back, was to have the use of four cottages situated on them, and shortly after this contract lessee's servants by mistake ploughed up these excepted allotments and raised a crop on them, which crop was appropriated and sold by the lessee, and the lessor entered no formal objection, and afterwards made use of the cottages, Held, *that in an action for rent under this contract the lessor could not recover any rent for the four allotments used by the lessee.*

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This was an action in which plaintiffs claimed (A) £1393 2*s.* 1*d.* as and for rent of certain lands up to the 28th February, 1894; (B) £291 9*s.* 3*d.* balance for work and labour done, and goods sold and delivered; (C) £5000 damages for breach of contract. Plaintiffs were joint owners of the farm Carnarvon, in the district of Wodehouse, and defendants were a limited liability company incorporated in England, and carrying on business in the Colony. It appeared that in 1887 Mr. Arnold Henry White was in the Colony and was acting for Lady Ossington, who was anxious to promote a scheme of immigration of destitute families from England to the Colony, and was willing to furnish funds for the purpose of sending out such families and enabling them to start farming here. In furtherance of this

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scheme a written contract was entered into on the 20th September, 1887, between the plaintiffs and Arnold Henry White whereby it was agreed that the plaintiffs should permit Arnold Henry White to enter upon portion of the farm Carnarvon, viz. 1250 acres of arable land, and 3000 acres of pasture land, for the purpose of locating thereon twenty-five families of immigrants, and that they should permit the said immigrants to reside upon and use the said land with certain water rights as long as the rent reserved was duly paid. White, on his part, agreed amongst other things to erect on the land twenty-five dwelling-houses, and to locate on it twenty-five families. It was agreed that no rent should be paid to the plaintiffs for the first year, but that thereafter each immigrant should pay to the plaintiffs the yearly rent of 7*s.* 6*d.* per acre for each acre of arable land allotted to him, this to be increased to 12*s.* 6*d.* per acre after railway communication between the farm and the Midland system of railways was completed. The buildings were erected and the families located, and in the year 1891 the defendants (who were a charitable association incorporated to carry on this work of Lady Ossington's) took over by written contract all the rights and obligations of Arnold Henry White under the contract of 1887. There was a schedule annexed to the contract of 1887 containing regulations for the management of the settlement, and it was provided in the contract that each immigrant should be obliged to abide by these, and that in the event of his failing to do so he should be liable to summary ejectment. One regulation was that each settler should observe all bye-laws to be made by White, or by him and plaintiffs, for the proper cultivation of arable land, repairing of buildings, and so forth; among the bye-laws was one which enacted that each settler should keep his land free from noxious weeds, and another that he should plough in the stubble on his allotment immediately after his crops were reaped.

In the beginning of 1893 the number of settlers on the farm had diminished to two or three families, and there was a considerable amount of rent due to the plaintiffs by these and earlier settlers. In that year an agreement was made between the plaintiffs and Mr. J. W. Bell, managing director of the Association in Cape Colony, that the Association would undertake to pay all the rents due by the individual

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settlers up to the 28th February, 1894, and would themselves take a lease of the land for three years from the 28th February, 1894, in consideration of the plaintiffs taking back four allotments and making a reduction in the rent due and to become due up to February 1894; for the three years from that date defendants were to pay a rent of 7*s.* 6*d.* per acre. This agreement was not reduced to a formal contract in writing, but its terms were contained in a series of letters between plaintiffs and Mr. Bell, the purport of which is fully set forth in the judgment. Defendants continued in occupation under this agreement till the 20th February, 1895, when Mr. Joyce, a director of the Association, who was sent out from England with power to represent the board of directors, terminated the contract, and handed over possession of the property to plaintiffs. They then instituted the present action.

As regards their claim B there was no dispute, defendants making a tender which was accepted; but as to A defendants tendered the amount, except £75, rent at 7*s.* 6*d.* an acre, for the year 1894 for four allotments of 50 acres each, which four allotments plaintiffs had agreed in 1893 to take back, but by mistake defendants had ploughed with the rest of the farm. Claim C was for £5000 damages for breach of contract and for neglect by defendants of their duty, "in that they had hired the lands from February 1894 upon the same terms and conditions upon which the immigrants had occupied, and were occupying, the same, and so were bound to keep the houses, gates, and fences in repair, to keep the main water furrow clean, and to keep the arable lands free from noxious weeds, and to plough in the stubble on the said lands immediately after the crops were reaped." With regard to this last claim defendants pleaded that they had agreed to hire the said land as mere lessees, without reference to the special conditions binding on the settlers, and without any contract or undertaking in regard to such conditions, and tendered £100 in full settlement. The other facts found to be proved will appear fully from the judgment of the Judge-President.

Maasdorp, S.-G. (with him *Blaine*), for plaintiffs. As regards the four allotments, plaintiffs did agree to take them back, but defendants chose to abandon this agreement

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and use them; consequently they were liable for rent for them, or if not for entire rent were bound to pay something as compensation, yet nothing was tendered in the plea. The only other issues were as to the terms on which defendants had taken over the settlement and the amount of damages. The letters put in clearly showed that defendants took over on the same terms as the immigrants had held under, and consequently were bound to observe the bye-laws; but even without these bye-laws they had neglected the duties of ordinary lessees. The lands were shamefully neglected, and nothing had been done since 1893 to clean them. To plough in the stubble now at 6*s.* an acre (as was estimated by witnesses) would cost at least £330, and repairs to cottages, fences, &c., another £300, and whatever profit plaintiffs can get from taking back the land can only be set off against loss of rent, not against other incidental damage: *Voet*, 19, 2, 22.

Sampson (with him *King*), for defendants. The contract was only to pay rent for the land, less four allotments, and consequently only this rent could be claimed. Plaintiffs might be entitled to some compensation for defendants' use of the land, and there was evidence that they had been offered and refused half the produce of the lands; but as their claim was for rent they could not recover this compensation now, so it was unnecessary to tender in the plea; besides, when it was quite evident a tender would be refused, there was no need to make it: *Patterson* vs. *Umzuito Sugar Company*, 3 Rosc. 66; *Myburgh & Co.* vs. *Protecteur Insurance Company*, 3 Rosc., 18; *Wolff & Co.* vs. *Bruce, Mavers & Co.*, 7 Jut. 133. As regards second issue, defendants are not bound by the same conditions as the settlers; these are never mentioned in the correspondence, and some of them quite inapplicable. Plaintiff has not in any case proved any damage caused by defendants, as the evidence goes to show the lands were as bad in 1893 as when the breach of contract occurred, and the amount of depreciation due to the defendants has not been proved: *De Beers Consolidated Mines* vs. *L. and S. A. Association*, 10 Jut. 359.

Cur. adv. vult.

Posteà (Aug. 29).

BARRY, J.P.: The declaration alleges that on the 29th

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September, 1887, the plaintiffs entered into an agreement with Arnold White, whereby among other things plaintiffs agreed to admit Arnold White to enter upon certain 1250 acres of arable land, and 3000 acres of pasture land on plaintiff's farm Carnarvon, in the district of Wodehouse, for the purpose of locating twenty-five families of immigrants, allowing them to reside on and cultivate the arable land, and use the pasture land and enjoy certain water and water-rights, so long as the annual rent reserved be paid, White agreeing to erect twenty-five dwelling-houses on the land and locate these twenty-five immigrant families; it being further agreed that no rent should be payable to plaintiffs for the first year, but that thereafter each of the immigrants should pay plaintiffs yearly 7*s.* 6*d.* per acre of arable land allotted him until railway communication with the Midland system be completed, when the yearly rent should be 12*s.* 6*d.* per acre, payable half-yearly on the 28th February and the 28th August; that White erected the dwellings and located the immigrants, and that in 1891 by agreement between White, the plaintiffs, and the defendants, White ceded all his rights under the agreement to the defendants, who took over all White's obligations and liabilities; that in 1893 there was a large amount of rent due by the immigrants to plaintiffs, when through J. W. Bell (defendants' attorney and managing director in the colony) defendants agreed that in consideration of plaintiffs taking back certain portions of the land and reducing the rent payable under the lease in terms of account A annexed defendants agreed to pay the rent then due and to become due up to the 28th February, 1894, with interest, and hired the land on the same terms and conditions upon which the immigrants had occupied and were occupying them but at a reduced rental of 7*s.* 6*d.* per acre per annum for a period of three years from the 28th February, 1894, to the 28th February, 1897; that under these agreements defendants occupied the land until the 20th February, 1895, when, through their agent, Arthur G. Joyce, they unlawfully abandoned the land and removed from it all their stock and assets; that there is due to plaintiffs (1) £1393 2*s.* 1*d.* as rent up to the 28th February, 1895; (2) £318 14*s.* 3*d.*, less £27 5*s.*, for work and labour done and goods sold and delivered; (3) £5000 as damages for abandoning the land and for not keeping the

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houses, gates, fences and water-furrows in a proper state of repair, and for not keeping the arable lands free from noxious weeds, and for failing to plough in the stubble on the lands immediately after the crops were reaped.

In their plea defendants deny that they hired the remaining allotments on the same terms and conditions as the immigrants, but say they hired them as mere lessees without reference to the special conditions binding on the settlers; they admit that they abandoned the lands and cancelled the agreement, and for rent up to February 28th, 1895, they tender £1318 2*s.* 1*d.*, alleging that plaintiffs are not entitled to rent on four allotments of 50 acres each, which they took back in terms of the agreement of 1893, and consequently are not entitled to claim the difference, £75. As to plaintiffs' claim (2), partly for work and labour done, which consists of £50 due on the making of Sermonetta furrow, the defendants admit their liability for the capital amount for this item as well as for two years' interest thereon, but deny that plaintiffs are entitled to four years' interest thereon as claimed by them, saying that they "are willing to pay such further interest thereon as may be proved to be due, they having no knowledge of the matter sufficient to determine the exact sum." On the second day of the hearing, however, defendants tendered the additional interest of £6 claimed, so that on this head plaintiffs have established their claim to £62 part of their claim (2). The other claims of plaintiffs for work and labour done consist of four items for threshing crops, and amount without interest to £152 6*s.* This amount in their plea defendants tender without interest, and plaintiffs accept this tender. Plaintiffs' claim for goods sold and delivered consists of three items, of which one amounting to £6 5*s.* for iron pipes is not pressed, while as to the other two, viz., £27 16*s.* with interest thereon, and £49 13*s.* 5*d.* with interest, both on open accounts, defendants in their plea tender to pay "upon details being given and found to be correct." On the second day of trial these amounts without interest were also tendered, and plaintiffs do not now claim interest. There is therefore admitted to be due by defendants to plaintiffs in respect of plaintiffs' claim for £291 9*s.* 3*d.*, a sum of £264 10*s.* 5*d.*, for which plaintiffs are entitled to judgment, and which amount is in excess of defendants' tender in their plea by £83 9*s.* 5*d.* As to the plaintiffs'

claim for £5000 as damages defendants "deny the amount claimed, and tender £100 as sufficient." This tender is admitted by plaintiffs, who however contend that it is wholly insufficient.

The issues, therefore, in final dispute between the parties, are:—I. Whether plaintiffs are entitled in this action to recover the £75 rent for the four allotments, which admittedly they agreed to take back, but a portion of which, after that agreement, was undoubtedly used by the defendants for raising crops now in their possession, half of which, before action, they tendered to plaintiffs as compensation for such use, although there is no reference to this tender in the plea of defendants, who now contend that it was impossible to plead such a tender to the plaintiffs' form of claim for rent, which is founded on special contract. II. Whether plaintiffs are entitled to anything in excess of the £100 tendered for breach of contract. In order to determine this it will be necessary to see what were the actual terms of the contract under which defendants held the land which they abandoned. As by far the most important, if not the real issue between the parties, arises from the dispute as to the terms of this contract, we shall deal with it first, and in doing so, it will be convenient, as shortly as possible, to trace the history of the unfortunate Tennyson settlement, in which were embarked and lost many hopes and much money contributed by the charity of Lady Ossington. It appears that Mr. Arnold White was in the Colony in 1887 representing Lady Ossington in her charitable efforts to assist emigration from England to South Africa, and on the 29th September, 1887, he entered into the contract partially, though not incorrectly, set out in the declaration. Under this contract the charity agreed to erect twenty-five cottages for the use of twenty-five immigrant families, to supply them with agricultural implements, oxen, and seed for the first year, and also with rations for six months, and to pay the cost of the completion of fencing. It is admitted that the charity spent £700 in the erection of cottages, £400 in having the lands ploughed, and £200 in fencing; also, that a store costing £60 was erected on plaintiffs' farm, and also a school-house, and that £250 was spent on what is called the Sermonetta furrow. Plaintiffs themselves were paid for making most of these

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beneficial improvements on their property amounting to over £1600. Among the clauses not in the declaration, but referred to in argument, were the following, viz. that plaintiffs and Arnold White might in concert, if both present, or, if one absent, then the other alone, summarily eject any immigrant occupier and his family from his holding, and might resume possession of it with buildings and improvements, for any of the causes set out in a schedule annexed to the agreement. There were nine of these causes, and among them the following, viz. that the immigrant should abide by all *bye-laws* that might from time to time be made by White and the plaintiffs for the good government of the settlement, that he should not sub-let without the proprietor's written consent, that he should not be sentenced to imprisonment for any crime without the option of a fine, or be convicted of drunkenness; that neither he nor the members of his family should be guilty of gross immorality or addicted to the use of bad language, nor abscond from the settlement, or remain more than thirty days absent without leave. Another clause in the agreement was that if any holding remained unoccupied, or the rent unpaid for two years, the holding, with buildings and improvements, reverted to plaintiffs. Bye-laws were framed and signed by plaintiffs and White, to which each immigrant was bound to subscribe. Among these were the following:—No. 9. "Every settler shall be compelled to keep his arable lands free from noxious weeds"; and after describing the weeds, the framers of this bye-law impressed upon the settlers the importance of this in their own interest. No. 10 provides that "Every settler shall plough in the stubble on his allotment immediately after his crops are reaped." No. 11. "Every settler shall keep his homestead in good repair and be responsible for the condition of his fences, also for any damage he or his servants may do to any gates or other property on the settlement." These elaborate regulations were by the majority of the immigrants from the outset disregarded, and they were either unable or unwilling to farm their holdings with success, and, although the first year's rent was under the original agreement not exacted from any immigrant, immigrants either could or would not pay rent even for the second year, and this was waived by plaintiffs. White represented Lady

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Ossington up to the time of her death, apparently in 1891, when the defendant Association stepped into Arnold White's place and undertook his obligations to the plaintiffs. Matters went from bad to worse till 1893, when a large amount of rent was in arrear. In 1891 Mr. J. W. Bell (who had previously been White's confidential agent and attorney in the Colony) became a managing director for the defendant Association, and continued in that position till the present dispute arose. There being this large amount of rent in arrear, in 1893 a correspondence took place between the plaintiffs and Bell (acting on behalf of the Association), and in five letters which formed part of this correspondence the terms of the contract relied on must be found. Prior to the first of these letters plaintiffs (who it appeared, under the terms of their agreement with White, would have been entitled to 12*s.* 6*d.* an acre instead of 7*s.* 6*d.* in consequence of the completion of the railway), in view of the manifest inability of the immigrants to pay this increase, offered to reduce the rent to 9*s.* 4½*d.* on condition of payment of arrears. It was in consequence of this that on the 13th October, 1893, Bell wrote to the plaintiffs proposing that the increased rent of 12*s.* 6*d.* should be reduced to 7*s.* 6*d.*, as a matter on which the continued existence of the settlement depended, and said, "Your (plaintiffs') offer, in case the Association would guarantee the rent for two years, was practically 9*s.* 4½*d.* an acre. The directors considered that, as *their guarantee would practically mean renting the whole settlement* for a sum equal to so much an acre, and in view of the scheme being even yet in its infancy, you might make the rent *to the Association* 7*s.* 6*d.* an acre," and invites discussion. On the 30th October we find Bell again writing to plaintiffs, saying that he was authorized by his directors in England to pay out of the first money received (apparently from the settlers) the balance of rent to the 28th February, 1892—"interest on arrears of rent at 7*s.* 6*d.* per acre from the 28th February, 1892, to the 28th February, 1893, in lieu of the full rent of 12*s.* 6*d.* per acre. I am requested to ask you to accept rent on the whole of the settlement land, less certain lots agreed to be taken back as unfit for cultivation for three years at 7*s.* 6*d.* per acre, provided that the Association will guarantee the rent; this concession is asked in order to further the objects of the scheme by enabling the

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directors to send out as many more families to the settlement as possible, and on terms that the settlers will be able to fulfil." At this date it appears that the settlers had dwindled down to two families. After this Bell had an interview with plaintiffs in November, and, according to his own account, this led to the agreement which will be found in the subsequent letters, and which in his opinion was intended to embody his own proposals in the letter of the 30th October already mentioned. On the 1st December plaintiffs wrote to Bell what they considered the causes of failure, and proposed "that to lessen defendants' responsibilities the Sermonetta allotments (250 acres) should be taken back from plaintiffs from the 28th February, 1894, with cottages, on condition that, while plaintiffs relieved defendants of all rent responsibilities, the houses (meaning the houses on Sermonetta) should be only lent to plaintiffs till such time as they shall be required by fresh immigrants"; and adds "that as the land below the big reservoir had become unfit to some extent for agriculture," plaintiffs would take back these allotments. The Halses were, however, to have the use of the cottages until required for new immigrant families. This apparently indicates that the acreage upon which the reduced rent was payable was to be reduced; the cottages were to be at the disposal of future immigrants, but meanwhile should be lent to plaintiffs, who subsequently occupied them, and were in occupation at the commencement of this action. After referring to other conditions plaintiffs add that as to rent concession (referring to Bell's letter of the 30th October) they will be willing, if certain arrear claims, not now in dispute, are satisfied, to "take rent for the whole of the remaining lots (*i.e.*, less those we take back) at 7*s.* 6*d.* per acre for a period of three years, which will expire on the 28th February, 1897. Should this meet with the approval of the Association, they (the defendants) will agree to lease the said lands for such term of three years, and to pay the rent due promptly at the end of each half-year. By this arrangement of the E. C. C. A. (defendants) farming the holding, *they will practically become the tenants and be responsible for keeping cottages, lands, &c., in order.*" On the 15th December Bell (who admits that he had seen Walter Halse on the 14th) writes and asks for better terms in regard to arrear rents, and states that a good deal of the land was

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unfit for cultivation, but adds that the questions have been practically arranged; and then on the 22nd December, 1893, writes that he had been in communication with his London directors, who were content with the proposed arrangement, and had left it to Bell to come to final terms of settlement, and adds "the terms are practically the same as contained in your last letter, the only point being that you will see that I spoke of the land worthless for cultivation as being taken back this year, having quite understood when we were talking it over on the ground that that was your intention. I hope, therefore, that you will not press the point of rent for that land this year, as it is scarcely an arguable one, and would tend to spoil the pleasing effect of a satisfactory arrangement to the people at home." It is admitted on the pleadings that Bell was authorized to enter into any contract that can be deduced from this correspondence, and we come to the conclusion that defendants hired the land for three years from plaintiffs at 7*s.* 6*d.* an acre, payable half-yearly, and became responsible for keeping the cottages, lands, &c. (which must include fences), in proper order. The plaintiffs have gone much further, and concluded that defendants undertook all the obligations of the settlers under the agreement with White in 1887 and the bye-laws under it, and rely on the evidence of Mr. Bell, who was called for plaintiffs, and who stated that it was clearly understood at the date of the contract in question that the defendants were to carry out the bye-laws. The terms of the letters do not seem to bear out this contention, and it is further clear that many of the bye-laws already quoted were wholly inapplicable to the defendant Association, as for instance those relating to drunkenness and immorality on the part of the settlers. The defendants, however, undertook to keep the cottages, lands, and fences in proper order, and we think that this must mean keep and hand over to the plaintiffs at the end of the term the lands, cottages, and fences in such order and repair as the settlers were bound to keep them. The introduction of further immigrants was undeniably contemplated, and both sides contemplated that the lands were to be worked, and the buildings put by the Association in the three years agreed upon, in the same order as the original settlers were bound to keep them. When defendants com-

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mitted the breach of contract the settlement was in about the same condition as in December 1893, but not in the order in which plaintiffs had a right under the contract to expect it to be at the end of the term, viz., February 1897. The real difficulty arises from the absence of satisfactory evidence as to what amount would have to be expended in order to place the settlement in proper order. We come to the conclusion that the Halses have not lost anything, but are gainers by being obliged to take back the lands. Upon this latter point we have the evidence of both plaintiffs, who say that the land can produce in its present condition 2000 bags of wheat, valued by them at 15*s.* a bag, or £1500 in all, at a cost of at most £800, or a profit to them of £700 a year, whereas the rent would have scarcely been £400 a year. As a fact plaintiffs have ploughed about 625 acres, which Mr. Bailey (a credible witness for defendants who recently inspected the place) said "made a capital show." Bell moreover says that plaintiffs told him that they could do much better with the place than let it to defendants, and that it would be no loss to them to take it back; this must have meant in the condition in which it then was. There is evidence for the plaintiffs that if the land had been in good order when the breach took place, double of this yield, or 4000 bags, would have been obtained, or a profit of £1400 a year; while Mr. Bailey says that 3000 bags would in the best circumstances have been the yield; this would make a profit of £1050 a year. The plaintiffs' calculation is that, although by the agreement they would only have got £400 a year during the remaining two years, and compensation at the end of that time for non-delivery by defendants of the lands and cottages in good order, the defendants' breach enables them to get that compensation at once, and, instead of £400 a year, profits at the rate of £1400 a year during the two coming years. This they cannot; such profit is not a measure of damages, and it may with more force be contended that inasmuch as plaintiffs are likely to gain during the next two years a profit of £700 a year from the settlement as it is, instead of their rental of £400 to which they would have been entitled under the contract, this profit must be deducted from the cost of putting the place in repair. Neither conclusion can, however, be supported; the defendants may fairly say that as plaintiffs are earning, or

are likely to secure, £700 a year instead of £400, they cannot claim damages for loss of rent; but although plaintiffs will, in earning this £700 a year, at the same time have a surplus of about £300 a year, which, if spent on keeping the lands clean, in addition to the ordinary expenditure in ploughing the neglected lands, will leave them free from noxious weeds and clean at the end of two years, defendants cannot so free themselves from their breach of contract to deliver the land in good order. Had the defendants themselves caused the lands to be properly farmed, it is possible that by such farming, even without immigrants, they might have been able to put the place in order without loss to themselves by the end of the second year, but by their arbitrary abandonment of the settlement they are unable to do so, and cannot avoid the penalty attaching to leaving the place so abruptly in bad order. It is enough to say that plaintiffs have suffered no pecuniary loss through the breach except the cost of putting the settlement in the same order as the settlers ought to have left it at the end of two years, allowing for reasonable use. The question is, what is this cost? As to the cottages they had no doubt suffered in consequence of non-occupation, but we cannot think it was the duty of defendants to restore them to their exact original condition, as seems to be the demand implied in the evidence led by the plaintiffs, who, in the estimate they put in, seek to recover the cost of replacing all the brickwork decayed or damaged in any way. The plaintiffs' total estimate is £267, from which they admit about £40 must be deducted, for repairs to the cottages. We think that £100 spent upon repairs would cover repairs to window-frames, sashes, doors, and flooring, and in certain cases brickwork not the effect of ordinary use. We think that plaintiffs are entitled to £15 claimed by their counsel in argument for fencing.

As to the costs of putting the lands in order, the evidence for plaintiffs goes to show that to plough in the stubble (assuming such stubble to be over the whole of the 900 to 1000 acres stated to have been tilled by the immigrants) would cost about £300, or 6*s.* an acre. There is, however, evidence that some of these lands are in fair condition, and guided by the evidence of Mr. Bailey and Mr. Middlewick as to their present condition and the immediate agricultural

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prospects from them, we think that £150 would cover damages on this head. We cannot support defendants' contention that, because plaintiffs have received the benefit of Lady Ossington's expenditure on their land of some £1500, and were therefore, at the time of the breach, much better off than in 1887, plaintiffs are therefore entitled to no damages. By contract plaintiffs got the benefit of these improvements; it is quite possible that it was folly to expend £1600 of Lady Ossington's money on this farm, and to enter into a contract which gave plaintiffs the property in the beneficial improvements without compensation, and some may regret that defendants voluntarily, through Mr. Bell, their accredited agent, contracted to undertake responsibilities which almost invited disaster; but we have merely to decide upon the legal effects of a breach of contract, committed in a manner not to be justified, and which has probably induced the uncompromising attitude subsequently adopted by the plaintiffs. The result is that we award £265 as damages for the breach of contract. In respect of £75 claimed in Account (1) as part of the rent under the December 1893 contract, we find that it was a material part of that contract (forming part of the consideration inducing it) that the four allotments should be taken back by plaintiffs. Plaintiffs were therefore entitled to them, and could have sued the defendants for possession and damages. The evidence shows that part of these lots was ploughed by defendants in error; plaintiffs, knowing this, not only raised no formal objection to an offer made on behalf of defendants that the crops should be equally divided, but subsequently took possession of the cottages connected with these allotments, thus confirming the original agreement. Suing, as they do, upon that contract, plaintiffs cannot in this action recover the £75 as though it were rent under that contract. Plaintiffs can sue for compensation, and may possibly do so hereafter, but we cannot think that in any case they would be entitled to more than £31 10*s.*, which is admitted to be half the value of the crops raised. As plaintiffs themselves now cultivate the settlement on the halves with their tenants, and actually took back and occupied a considerable portion of these for allotments in accordance with the agreement, we think that they would wisely accept this amount offered to them by defendants.

The final result of this action is, that in respect of plaintiffs' claim for £1393 2*s.* as rent, we award them £1318 2*s.* 1*d.*, the amount tendered in the plea; as to plaintiffs' claim for £291 9*s.* 3*d.*, balance claimed for work and labour and goods sold and delivered, in reference to which defendants tendered £175 1*s.*, we award the plaintiffs what, during the course of the trial, the defendants admitted was found to be due to them, £264 10*s.* 5*d.*, or £83 9*s.* 5*d.* in excess of the tender; as to plaintiffs' extravagant claim for £5000, as damages in respect of which defendants tendered £100, we award plaintiffs £265, and give judgment for plaintiffs, in all, for £1847 12*s.* 6*d.* As this is in excess of the tender of £1599 3*s.* 1*d.*, the plaintiffs are entitled to costs.

As this amount is only £248 9*s.* 5*d.* in excess of the tender it is very much to be regretted that, even after committing an arbitrary breach of contract, in cutting the noose which defendants put round their own necks by an unwise contract, no proper effort was made to avoid this litigation, which has disclosed much that is to be regretted from every point of view, and has involved this charitable association in a heavy bill for costs to be added to the many heavy known, and I fear also serious unknown, losses resulting from ill-conceived and injudiciously-managed schemes of immigration, most laudable in the intentions of those whose memories ought to have been perpetuated as public and private benefactors, but whose money has been wasted.

SEARLE, J., concurred.

[Plaintiffs' Attorneys, BELL & HUTTON.
Defendants' Attorney, G. G. WRIGHT.]

KOWIE RAILWAY SYNDICATE *vs.* DIVISIONAL COUNCIL OF BATHURST.

Act 40 *of* 1889, *sect.* 252—*Divisional Council—Valuation—Review.*

Where a Divisional Council had valued certain property, and the occupier and lessee had appeared at the subsequent Court of the Divisional Council, and had objected to this valuation on the ground that the property did not belong to the persons described on the roll as its owners and his objection had been overruled, and he then applied to the Eastern District Court to have the valuation set aside, the application was refused on the ground that the owner, who was the only person aggrieved, was not a party to the application.

SEMBLE—*Notwithstanding the provisions of sect.* 264, *Act* 40 *of* 1889, *the Court will review a decision of the Court of Divisional Council if any irregularity of proceedings be alleged, and the fact that this Court has confirmed a valuation of property already rated or not liable to be rated is an irregularity sufficient to make its decision liable to review.*

Although such a review may be dealt with on motion, where there are questions of fact in dispute the Court will leave the matter to be decided by action.

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Kowie Railway Syndicate *vs.* Divisional Council of Bathurst.

This was an application for a review of a decision of the Court of the Divisional Council of Bathurst, constituted under sect. 252, Act 40 of 1889.

The applicants were the Kowie Railway Syndicate, who are the lessees of the railway line and plant belonging to the Grahamstown and Port Alfred Railway Company in liquidation, and (as was stated in their affidavits) as such are by agreement liable for all rates and taxes that may be assessed in respect of the property of the said Company leased to them; the station of the Company at Port Alfred is situated in the Bathurst division, and about 28 miles of the railway line runs through that division, the Company being the registered owners of the land on which that station stands and also of four erven in the village of Bathurst, but of no other land in the division.

In 1885 the Divisional Council of Bathurst valued the property of the Railway Company as follows: Station, &c., at Port Alfred £4300, 4 erven at Bathurst £100, total £4400. In 1890 a fresh valuation was made, and the whole line and other property of the Company was valued *in globo;* to this the Company objected, but as the line was about to be closed no steps were taken to have the valuation reviewed. Again in 1895 the property was taken as a whole, and appeared in the Valuation Roll as "Railway line: *owners,* Grahamstown and Port Alfred Railway Company; *occupiers,* Kowie Railway Syndicate," and was valued by the Council at £10,000. At the Court of the Divisional Council held on the 21st June, 1895, the manager of the Syndicate objected to the valuation of the railway line as a whole on the ground that the farms through which the line runs being already valued this was rating the same property twice over, and also that the ground on which the land lay did not belong to the Company as it had never been transferred to them, and they had merely a servitude over it; he claimed that only the buildings and erven actually transferred should be valued. The Council, however, decided that the wording should remain as it was, but that the valuation should be reduced to £7500.

From the affidavits it appeared that in 1895 the valuator, in estimating the value of the railway line, had included all lands, buildings, embankments, and immovables, but not rails, &c., from the commencement of the line to the centre of Blaauwkrautz bridge, which is the limit of the Bathurst division; the bridge, which belongs to the Company, alone cost £25,000. As Act 5 of 1881 gave the Company power to expropriate to the width of 30 feet along the course of the line, he appeared to have regarded this much land as belonging to the Company; he stated that in valuing the various farms through which the line passed he had deducted the value of the land occupied by the railway, but this was denied, and certain farms were shown to be valued at a higher rate in 1895 than in 1885, when no separate valuation of the railway was made. The lines, besides passing through these farms, goes over the Bathurst commonage and three Government outspans, and it was alleged that this part of it was wrongly included in the valuation. The applicants denied that the Company had used its powers of expropria-

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tion, or paid anything on account of land taken over, but this was disputed.

The grounds of review stated in the notice of motion were, (1) that the valuation included the whole line of railway, whereas the Company are the owners of the land on which the station at Port Alfred is built and of four erven at Bathurst and of no more; (2) that the properties through which the line passes are already rated and valued against the several registered owners thereof; (3) that the railway line is a movable asset, and so not liable to be rated.

Sampson, for respondents, took a preliminary objection to the application being heard, as sect. 264, Act 40 of 1889, provides that the decision of a Court of Divisional Council upon any objection to any valuation shall be final and conclusive.

Blaine, for applicants: The Court has power to review the proceedings of an inferior Court on the ground of irregularity notwithstanding the proviso; here there is a gross irregularity, as they have rated property against the wrong owners, and some of it twice over. *Q.* vs. *Heydenryck*, 2 E. D. C. 248; *Kimberley Town Council* vs. *L. & S. A. Exploration Company*, 1 Ap. Ca. 385. Under sect. 243 of the Act only the owners of immovable property are liable to be rated; except the buildings at Port Alfred and the land at Bathurst the Railway Company own no immovable property. Act 5 of 1881 gave the Company the right of expropriating, but this was never exercised; even if negotiations were entered into for expropriation, which was not clearly proved, still the preliminary steps were never completed, and till they were the land remained the property of the original owners, who were liable for rates: *MacDonald* vs. *Port Elizabeth Municipality*, 8 Jut. 37.

[*Per Curiam.* Are not the syndicate as occupiers liable for the rates in any case? and if so, how are they injured by the wrong owners being entered on the Valuation Roll?]

It might increase the difficulty which the occupiers would have in recovering the rates from the owners; besides, we complain that certain of the property has been rated twice over, and that Government and municipal property, which by the Act is exempt, has been included in the valuation.

Sampson, for respondents. In view of sect. 264 no review

of the Divisional Council's decision can be allowed, except on the ground of fraud, corruption, or some gross irregularity. Here it is a simple question of fact that is appealed against, whether £7500 is too high a valuation. *Prince Albert Board of Management* v. *Jooste*, 4 Jut. 400. Besides, there is considerable evidence that the Railway Company were actually owners of the land through which the line passed.

BARRY, J.P.: This application must be refused. It is made by the Kowie Railway Syndicate, who are the lessees and occupiers of certain property, and they rest their application on two grounds: first, that the parties who are described as the owners of this property are incorrectly described and rated as owners, and secondly, that the property has been rated twice over, having been previously rated against the true owners, namely, the proprietors through whose land the railway passes. As regards the first of these grounds, I am far from saying that the rating as it appears in the Divisional Council Valuation Roll is in form correct; but if it be incorrect, those who are injured are not the applicants, as, being admittedly occupiers, there are strong reasons for supposing they would be liable at all events in this capacity. The parties who should have come here are the Railway Company; they have not done so; when they do the Court will then be able to decide on the correctness or otherwise of this valuation. I am inclined, however, from what we have heard, to think that if they do come before us it will have to be by action and not by motion, and thus enable the Court to get at the bottom of the facts which appear to be in dispute. As regards the second ground, there is some evidence that the property has been already rated against the true owners, but this evidence does not amount to proof, and in this conflict of testimony we could not grant this application even if the proper parties were before us. The application will be refused with costs.

SEARLE, J.: I concur. Although it is competent to decide a matter of this kind on motion it is not always convenient; here there is a conflict of evidence and all the facts are not before us, the agreement under which the Syndicate hold from the Railway Company not being either put in or

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referred to. Apart from this, the Syndicate as occupiers of this property object to the rating of certain persons as owners; this is not the proper form in which to have this matter decided; whether it be brought forward by motion or by action the owners should be made parties, and here they are not before the Court at all. As to the objection that certain municipal and Crown property, which is properly exempt from rating, has been included in this valuation, it is enough to say that this has not been mentioned as a ground of review in the notice of motion, which sets out the different grounds of objection. The owners may here have a good case; on this subject I express no opinion; but if they wish to rely on it their proper course is to issue summons and have the matter tried by action.

[Applicants' Attorneys, BELL & HUTTON.
Respondents' Attorneys, STONE & SON.]

STUURMAN *vs.* WILSON.

Magistrate's Court—Procedure—Summons—Public Holiday.

Where a summons in the Magistrate's Court is returnable on a day that is a public holiday, the Magistrate should try the case on the following day.

Where a Magistrate heard a suit, the summons in which had been made returnable on Easter Monday, on the next day fixed for the hearing of civil cases in Magistrates' Courts, namely Thursday in the same week, and gave judgment against defendant, who was in default, and thereafter a writ was issued: Held, *that the summons had expired, and that the judgment and subsequent proceedings must be set aside.*

1895. Aug. 16. „ 22. — Stuurman vs. Wilson.

This was an application by motion to set aside the summons and all subsequent proceedings in a case tried by the Resident Magistrate of Colesburg.

The grounds stated in the notice of motion were that the summons in the case was returnable on a public holiday, "and also the grounds shown in an affidavit of applicant dated the 22nd July, 1895."

From this affidavit and others filed by applicant and

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respondent, it appears that applicant, a native called Stuurman, was indebted to John Wilson in the sum of 18*s.* for grazing, and received a summons for this amount returnable in the Resident Magistrate's Court at Colesburg on Monday, 15th April, 1895. This day was Easter Monday, and applicant, on coming into Court at Colesburg, found it closed; on the next day, Tuesday, he again came into Colesburg and tendered 18*s.* to respondent's attorney in settlement of the claim, which sum the attorney accepted, but demanded a further amount of £2 as costs, which applicant said he refused to pay on the ground that he had been summoned for a public holiday; respondent's attorney, however, stated that he promised to pay this £2 in instalments. On this Tuesday the Magistrate's Court did not sit, but on the next Thursday it did, and adjudicated on the claim against Stuurman contained in this summons, which was returnable on Easter Monday. The defendant Stuurman was in default, and no notice was given to him that the case would be heard on that day; evidence having been given of the payment of 18*s.* since summons issued, judgment was given for plaintiff for £2 11*s.* costs. Thereafter a writ was issued and the property of applicant attached to satisfy the judgment. The present application was to set aside these proceedings and the summons on which they were based.

Government notice 204 of 1856, issued under Act 20 of 1856, Schedule B, provides that Resident Magistrates shall hold a Court for the trial of civil cases on Monday and Thursday in each week, and if either of those days shall happen to be one of the stated public holidays (among which is Easter Monday) "then upon the following day."

Hayton, for applicant: The Monday upon which the summons was returnable being Easter Monday, the Magistrate was bound by the Government notice to hold a Court the following day, and on that day this summons would have been properly before him. Not having been tried or formally postponed that day it lapsed, and the proceedings on the next Thursday were null and void. *Hanson & Schrader* vs. *Pauling*, 4 Jut. 92; *Gardner* vs. *Cohen*, 3 H. C. 58; *Schutte* vs. *Wylde*, 1 Men. 403; *Mlaba* vs. *Mlonsha*, 9 E. D. C. 7.

[SEARLE, J.: Your notice of motion asks that the summons

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should be set aside, as it was returnable on a public holiday. Should it not rather have been that the case was tried on a day on which the summons was not returnable?]

The notice also says "and on the grounds stated in the affidavit;" there this ground is set out, and from respondent's affidavits he evidently knew it was to be relied on.

Burke, for respondent: The following day means the following Court day; the magistrate is correct in saying that as he could only hear civil cases on Monday and Thursday he had no power to sit on Tuesday the 16th; so the case stood over till the next Thursday, when it was heard.

Cur. adv. vult.

Posteà (Aug. 22).

BARRY, J.P.: This is an application to set aside the "summons and subsequent proceedings" in a suit in which Wilson was plaintiff, and the applicant, Stuurman, defendant, tried before the Resident Magistrate of Colesburg on the 18th April last, on the ground that the summons was returnable on Easter Monday, the 15th April, which was a public holiday, and also on the grounds shown in the affidavit of applicant sworn on the 22nd July, 1895. In this the applicant states that he repaired to the Magistrate's office on Monday, April 15th, and found the Court closed; that on the next day he tendered to respondent's attorney (who told him that the case could not come on till Thursday) the amount sued for; the attorney accepted it, but claimed £2 more for costs, which applicant refused to pay. The real question now to determine is whether the magistrate who did not sit on the day following Easter Monday could legally hear this case on this summons on the Thursday following, and give costs against the applicant. The Magistrate is evidently of opinion that he could not sit and hear this case on Tuesday, April 16th, because it was not a day fixed by proclamation for the hearing of civil cases. In this we are of opinion that the magistrate was wrong; by the Magistrate's Court Act, No. 20 of 1856, Schedule B, it was provided that each Magistrate should hold a Court upon such days as shall from time to time be announced by Government notice in the Government Gazette. On

June 16th, 1856, there appeared in the Government Gazette a notice, No. 204 of 1856, by which it is provided that every Magistrate shall hold a Court for the trial of civil cases on Monday and Thursday in each week unless those days happen to be, amongst others, Easter Monday, and "then upon the following day." These last words required the Magistrate to sit on Tuesday the 16th, and as he did not do so the summons lapsed upon the principle acted upon by this Court in the case of *Mlaba* v. *Mlonsha*. In the present case there is nothing to show any consent on the part of the applicant to the hearing of this case on Thursday, nor did he even have official notice of it. I may add that by Government Notice 546 of 1895, it is provided that from the 1st June, 1895, every Magistrate shall if occasion require hold his Court daily, Sundays, public holidays, and non-business days excepted, and in case of emergency even on excepted days, not being Sundays. The present proceedings took place, however, before the 1st June, but even under this last notice the respondent would not have succeeded in establishing the validity of these proceedings. The summons and subsequent proceedings will be set aside, and although the application is not granted on the ground that the summons was returnable on a public holiday, but on the ground that the Resident Magistrate could not hear the case on the day on which he did so (which is the real ground of applicant's contention), the applicant is entitled to his costs.

SEARLE, J., concurred.

[Applicant's Attorney, T. B. VAN DER RIET.
Respondent's Attorneys, STONE & SON.]

QUEEN *vs.* RENSBURG AND OTHERS.

Act 37 *of* 1884, *s.* 6—*Native location—Native.*

Natives occupying a farm under the provisions of a will which gives them a right of occupation or ownership in the farm, are not occupants in the sense required to constitute a location under the Native Locations Act.

SEMBLE—*The fact of natives working on the halves with the proprietor of a farm does not entitle them to be held to be in his bonâ fide and continuous employment, so as to be allowed to live on his farm without constituting a location.*

SEMBLE—*The fact of a farm which is registered as belonging to one proprietor being really occupied by four joint owners, though not sub-divided in any manner, does not entitle these owners to allow natives to live on the farm in excess of the number which would constitute a location if the farm were occupied by a single owner.*

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Queen *vs.* Rensburg & Others.

Review of a decision of the Resident Magistrate of Alexandria; the case came before JONES, J., for review, and at his suggestion was argued before the full Court.

D. Rensburg, K. Rensburg, Jacobs, and Fichat were charged with contravening sect. 6, Act 37 of 1884, as amended by Act 33 of 1892, in that they did establish a native location on the farm Klipfontein, being private property, without having a license.

From the evidence it appeared that the four accused were owners of the farm Klipfontein under the will of Rensburg, a former proprietor; D. and K. Rensburg being his sons, and Jacobs and Fichat his sons-in-law. This will of Rensburg left the usufruct and profit of the farm to his two sons and two daughters for life, after their death the eldest son of each to inherit his parent's share, and also provided that a house should be established on the farm as an asylum for any descendants of the testator who were in needy circumstances to live in. After testator's death the four accused had divided the houses and cultivated lands on the farm amongst them, and occupied the grazing land in common.

There had formerly been a Native Location on this farm,

but it was abolished by a notice in the Government Gazette in December 1892 under sect. 4, Act 37 of 1884. On the 2nd May, 1895, the Inspector of Locations visited the farm and found at least twenty male adults apparently residing on the farm, and this prosecution was instituted. A notice in the Government Gazette of the 24th January, 1893, issued under sect. 1, Act 33 of 1892, fixed seven as the number of male adults whose occupation of dwellings on a farm should constitute a location in the division in which Klipfontein was situated.

Before the magistrate the defence was raised that of the twenty male adults residing on the farm, some were farm labourers hired by the month, while the remainder worked on the halves, and so were in the *bonâ fide* and continuous employment of the proprietor, and also that as there were four owners of Klipfontein they had a right to allow twenty-four male adult natives to live there without a location being constituted. From the evidence it further appeared that two of the twenty, viz., Hendrik Basson and Frederick Kourries, had married grand-daughters of the testator Rensburg, and claimed a right, being needy, to live in the asylum vested under his will. The evidence as to the nationality of two of the others, William Bowers and Peter Scholss, was slight, but it appears that Bowers was the son of a white father and a half-caste mother, while Scholss was the son of a Malay father and a half-caste mother. A native location is defined by sect. 2, Act 37 of 1884, as dwellings occupied by a certain number of male adults, "being Kafirs, Fingoes, Basutos, Hottentots, Bushmen, and the like."

The Magistrate found the accused guilty; the case was sent back to him to state his reasons and the facts he found proved. He stated that he found that over twenty male adult natives were on the farm; that all of these except ten were monthly labourers, and so in the employment of the occupier; but that ten whom he enumerated (amongst them being Basson, Kourries, Bowers and Scholss) were male adult natives living on the farm and not in the employment of the occupier. These ten worked on the halves, but he did not consider this amounted to the employment meant by the Act.

Maasdorp, S.-G., for the Crown: Basson and Kourries must

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be admitted to live on the farm under the terms of the will and so to be there by right; but that left eight male adult natives, and so the Act was contravened. As to their nationality, the Magistrate's finding on that must be accepted. Working on the halves does not make these natives in the *bonâ fide* employment of the occupier (*Q.* v. *Keeton*, 8 E. D. C. 78).

BARRY, J.P.: The conviction in this case must be quashed. The Crown have to prove that there were on May 2nd at least seven natives living on the farm who were not in the *bonâ fide* and continuous employment of the owner of the land. The defence raised before the Magistrate was that there were four owners of the land, and that each of these four by virtue of his ownership could give leave to any number of natives less than seven to live on the place. This defence fails, but the Crown is still obliged to make out its case, viz., that seven natives were living on the farm on the day in question. Now from the evidence taken before the Magistrate it appears that two of the residents cannot be regarded as having no right to live on the farm; one of them (Hendrik Basson) is a grandson by marriage of the original owner of the farm, and so under the will he is given a right to live in the "asylum," and so lives on the farm really as a quasi-owner. Frederick Kourries, too, has the same right under the will. The Solicitor-General admits that these two cases must be disregarded, but says there are still eight natives proved to have been living on the farm. Now with regard to six of these, that is, all except William Bowers and Peter Scholss, I am satisfied they are natives living on the farm, and not in *bonâ fide* and continuous employment of the owners within the meaning of the section; but to make up the seven either Bowers or Scholss have to be added. Bowers is described as the adopted son of one of the proprietors; this is not enough to prevent his being an occupant under the section, but there is no evidence that he is a "native" as defined by sect. 2 of the Act. There is evidence that his father was a European and his mother a "half-caste," that is, a person whose father was a European, and under these circumstances we cannot hold him to be a native as required by the Act. As to Scholss, his father was a Malay and his mother a half-caste. Now the word

Malay is not used in the Act, and I presume that eight Malays living together on a farm would not constitute a location, in fact the very word is inapplicable to their mode of life. If, then, Scholss is a Malay, the Magistrate was wrong in including him among the natives as defined by the Act who were living on the farm. The statute is a penal one, and must be construed strictly; the evidence does not support the conviction, and consequently it and the sentence will be quashed.

SEARLE, J.: I regret being unable to support this conviction, as I think it might be deduced from the evidence on record that besides the ten natives found by the Magistrate to be living on the farm, there were others there who were not in the *bonâ fide* and continuous service of the owner. However, we are bound by the Magistrate's reasons for his finding, and he says that only ten natives, whom he specifies by name as coming within the description of sect. 2 of the Act, were living on the farm. I think it might have been found that there were more; the evidence shows that many idle natives were living in this place, and that shortly before this a location had been in existence there; this location was abolished at the request of the owners of the farm, but from its abolition up to the date when the charge was laid many of the former inhabitants remained on in occupation. Taking, however, the ten natives whom the Magistrate found to be living on the farm, and not in the *bonâ fide* employment of the owner, it appears that four do not fall within the provisions of the section, as two of them were in occupation under the will of Rensburg, and two more were not of the nationalities mentioned in sect. 2. The defence raised in the Court below was that the farm was divided between four owners and consequently must be looked on as four separate farms, and also that as the natives were working on the halves with the owner of the land they must be regarded as in his employment. In my opinion neither of these defences can be sustained, but as the ten natives found by the Magistrate to have been living on the farm have to be reduced to six, and as six in that division do not constitute a location, there has been no contravention of the Act, and the conviction must be quashed.

Re NONTAMBE.

Act 35 *of* 1891, *Sect.* 13—*Lunatic—Procedure.*

When a Magistrate before whom a prisoner is tried returns a special verdict in accordance with Sect. 12, *Act* 35 *of* 1891, *that the accused committed the act charged against him, but was insane at the time he did so, he ought then to order the accused to be kept in custody as a criminal lunatic, till the Governor's pleasure shall be known, and ought not to issue a summary reception order under sect.* 27, *which only applies to the case of non-criminal lunatics.*

Notwithstanding the definition in sect. 3 *of the Act, Court must be taken for the purposes of the Act to include Courts of Resident Magistrate.*

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Re Nontambe.

This was an application to set aside an order granted by Mr. Justice JONES in chambers on the 26th June for the further detention of Nontambe, a lunatic.

From an affidavit made by the Resident Magistrate of Albany it appeared that a woman called Nontambe was tried for assault before him on the 7th May, 1895. After hearing evidence he found a special verdict to the effect that she was guilty but was insane at the time of the Act complained of, and made an order that she should be detained as a criminal lunatic until examined by two medical men as to her mental condition. He reported the case to the Governor and was informed that his warrant for her detention would arrive. He was subsequently informed by the medical superintendent of the Grahamstown asylum that he had got instructions to receive Nontambe in the asylum, and that, pending receipt of a warrant from the Governor, he required some authority for her detention. The Magistrate accordingly issued a summary detention order on the 12th June, and this was submitted to Mr. Justice JONES in chambers, and an order was issued by him on the 26th June under sect. 33 of the Act for the detention of the lunatic. On the receipt afterwards of the Governor's warrant, the Magistrate was directed by the Colonial Office to withdraw

his summary detention order and to report the matter to the Solicitor-General in order to have the order made in chambers set aside.

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Maasdorp, S.-G., as *curator ad litem* of the lunatic, moved that the order should be set aside.

Burke (appearing at the request of the Court as *amicus curiae*): It must be admitted the Magistrate was wrong in issuing the summary reception order. He treated the case as coming under Part III. of the Act which only applied to non-criminal lunatics, whereas the provisions of Part II. clearly ought to have been adopted. Part II. gives a double power to the Magistrate. First, sect. 13 provides "When such special verdict or finding (*i.e.* as found in this case) shall be returned, the presiding Judge or Court shall order the accused to be kept in custody as a criminal lunatic in such place and such manner as the Court shall direct till the Governor's pleasure shall be known, and it shall be lawful for the Governor thereupon, and from time to time, to give such order for the safe custody of the said person in such place and in such manner as to the Governor may seem fit."

[SEARLE, J.: Is it clear that in this section Court includes Magistrate's Court? Sect. 3 of the Act defines Court as meaning the Supreme Court, Eastern District Court, High Court of Griqualand West, and the Circuit Courts within their jurisdiction.]

It is provided that these definitions only hold "unless there is something in the context repugnant;" sect. 12 speaks of "the jury before whom, or the Court (where there is no jury) before which" a prisoner is tried, and this can only mean a Resident Magistrate's Court.

Secondly, under sects. 14 and 16, when it appears to a Magistrate that a prisoner is insane, the Magistrate may direct two medical practitioners to examine him, and if he is certified to be insane, the Governor may, if he thinks fit, direct such prisoner to be removed to an asylum. These are the only powers given by the Act in the case of a person charged or found guilty of a crime. The Magistrate in issuing his summary reception order was probably misled by a Government circular of the 4th April, 1892; this circular

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was issued to Magistrates for their guidance, and is as follows:—

"A question having arisen under the Lunacy Act of 1891 in the case of a prisoner found on arraignment or preparatory examination to be of unsound mind, I am directed to inform you that the Colonial Secretary is advised that when any prisoner is brought to trial and the Magistrate before whom the case is brought is of opinion that he is not in his sound senses he should not consider the prisoner as a criminal but an ordinary lunatic and should follow the procedure laid down in Part I. or Part III. of the Lunacy Act according to all the circumstances of the case."

This is clearly opposed to the provisions of the Act, which in Part II. sects. 14 and 16 enacts that a particular course shall be adopted when it appears to a Magistrate that a prisoner (defined to be a "person committed, whether on remand or for trial, safe custody, punishment or otherwise") is insane. Under the circumstances the Magistrate had adopted an erroneous proceeding, and the further order has been given without full knowledge of the facts, so I cannot oppose its being set aside.

Cur. adv. vult.

Posteà (Sept. 30).

BARRY, J.P.: A woman named Nontambe was on May 7th charged before the Resident Magistrate of Albany with the crime of assault and pleaded not guilty. In the course of the evidence proving the assault it transpired that the accused was subject to epileptic fits and had frequently fallen into the fire, and her face showed marks of burning; the Magistrate adjourned the case for a week that the condition of the accused might be brought to the district surgeon's notice; and on May 12th the case was resumed, and the district surgeon gave evidence that he had examined the woman, whose body was covered with scars from burning, and that the gaoler reported to him that she had had a fit in gaol; he also stated that if epileptic she would not be responsible for her actions, that she should be taken care of in the asylum, and was dangerous. It appears from the record that the Magistrate thereupon ordered that she be detained for examination by two medical men as to her mental condition; but in addition he found the prisoner

guilty, adding, "I consider the prisoner was insane at the time she committed the said crime." In finding this verdict he acted apparently under the provisions of sect. 12 of Act 35 of 1891. He also endorsed upon the records the words following: "From the evidence of the district surgeon the prisoner is committed to gaol until examined by two medical men as to her mental state." The Magistrate, however, issued an order for the *interim* custody of this woman as a criminal lunatic under sect. 13 of the Act, which provides that upon the finding above mentioned being made the Resident Magistrate shall order the detention of the prisoner as a criminal lunatic in such place as he may direct until the Governor's pleasure be known. As soon, therefore, as the finding under sect. 12 had been returned, and the order under sect. 13 given, the matter became one of administration by the Governor and did not require further proceedings until the Governor's pleasure was notified. But the Magistrate on the next day (May 15) obtained the certificates of two medical practitioners to the effect that the prisoner was then insane. This course, although the provisions of sect. 14 of the Act were not apparently present to the Magistrate's mind, might have been justified by that section which provides that where it appears to a Magistrate that a *prisoner* is insane, such Magistrate shall direct two medical practitioners to examine such person and inquire into his sanity. Whether the Magistrate before obtaining these certificates communicated with the Colonial Secretary's Office does not appear; he was, however, instructed by that office to send the woman to the Grahamstown asylum pending the arrival of the Governor's warrant. These instructions must have been issued under the belief that the terms of sect. 13 had been actually complied with, for if the case be under sect. 14 the Governor's warrant (as shown by sect. 16) is sent before removal. Upon the Superintendent asking for some authority to receive the woman, the Magistrate on the 12th June erroneously issued a summary detention order, and on that day and under that order the Superintendent received her. The Magistrate sent this order with the medical certificate to the Solicitor-General's office for presentation to a Judge in chambers, as if the proceedings had been taken under Part III. of the Act. This was also erroneous in view of the order which

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the Magistrate had granted, and on the 26th June, the Judge, being unaware of this order, issued an order as though the proceedings were under Part III. The Judge's order having been issued without full knowledge of the circumstances of the case ought now to be set aside, leaving the woman to be dealt with as a criminal lunatic under detention by virtue of the Governor's warrant which has now arrived.

SEARLE, J., concurred.

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PART II.

ROUX *vs.* LOMBARD.

Libel—Justification—Public interest.

Where plaintiff, in an action for libel, had previously sued B. for damages for seduction, and in this action had given evidence of the seduction, and had admitted having subsequently married without informing her intended husband of the seduction, and B.'s father afterwards writing to a newspaper described her as "a characterless woman," Held, *in an action for libel brought by plaintiff against him, that this was a fair comment on her conduct.*

Where plaintiff in a libel action had previously brought an action for seduction, and defendant shortly afterwards in the public press commented on the seduction case and on plaintiff's character as disclosed by her evidence in it, Held, *that plaintiff having made the facts referred to public, so as to invite comment on them, could not recover damages on account of defendant's repetition of these facts, even if it was not shown to be for the public interest.*

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ROUX *vs.* Lombard.

This was an action in which plaintiff claimed £500 damages for libel. The alleged libel was published in *The Journal* newspaper, and consisted of the following words:

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"But it seems as if the bad conduct and ill-behaviour of that characterless woman (plaintiff in the said suit) and of those who have associated with her (as have been proved) give you (meaning the editor of *The Journal*) reason to suppose that we are entirely indifferent about the morals of our daughters." The innuendo placed upon these words by plaintiff was that they meant that she was a bad, immoral woman without any character or reputation.

The defendant admitted publication, and pleaded that the words were true and written in the public interest. The publication of the words complained of arose out of a case (*Roux* vs. *Lombard*) tried before the Resident Magistrate of Albany, in which the present plaintiff (assisted by her husband) had claimed damages for seduction and the maintenance of her child from one Stoffel Lombard, a minor son of the present defendant; in that case judgment was given for defendant. By consent the evidence which the present plaintiff gave before the Magistrate in the previous case was put in, and (with the exception of the letter containing the alleged libel) was the only evidence taken in this case, as defendant's counsel was willing to rely on this evidence alone to support his plea of justification. This evidence showed that the plaintiff, Dorothea Solomina Roux, was about twenty years old, and from her twelfth year had lived with the defendant, Jacobus Frederick Lombard, and his wife, as one of their family and an assistant in the household work. About June, 1894, defendant's son, Stoffel Lombard, being home from school for his holidays, went to plaintiff's room at night, and with her consent had connection with her. This intimacy was continued on about twenty occasions in the next three months. Plaintiff was then unmarried, but about July, 1894, met her present husband, John Gideon Roux, and in the next few months, having seen him frequently in the meantime, got engaged to be married to him. In October, 1894, Mrs. Lombard, suspecting something about the plaintiff's condition, sent her with her mother to Grahamstown for advice, and on her return all three were aware that she was *enceinte*, and decided that her marriage with Roux should be hurried on. She was accordingly married to him on December 24th, 1894, having, as she admitted, purposely concealed her condition from him. On March 24th, 1895, she gave birth to a child, and shortly after

its birth she said Stoffel Botha was its father. This was the first time she had stated to any one the name of the person who had seduced her, and the statement was absolutely denied by Stoffel Botha. Her husband also denied that the child was his, and refused to pay any expenses in connection with it, but forgave her and condoned this pre-matrimonial offence. She unsuccessfully attempted to recover £20 damages for lying-in expenses, maintenance, etc., from Stoffel Botha, the Magistrate, after a long hearing, giving judgment for defendant. In her evidence she also admitted having some years before accused another man of making improper overtures to her, but said she only made this statement in jest. On June 4th (a few days after the judgment in the Magistrate's Court) the following paragraph appeared in *The Journal*:—

"THE AFFILIATION CASE.

"OBSCENE EVIDENCE.

"The affiliation case *Roux* (husband and wife) vs. *Lombard* for £20 damages and costs, which has taken up all the time of our worthy Magistrate during the last week, was finished on Saturday. The case was peculiarly disgusting, and the evidence all through was unpublishable. How some of the witnesses could come forward and make the statements they did without the least appearance of shame beats us. Certainly a state of things existing at Riebeck has been revealed which should cause parents to watch more closely over the morals of their daughters; but then the Dutch seem singularly lax in this respect. The most curious part of the case was that the young husband did not seem to think any the worse of his wife because she was *enceinte* when they were married, and he even assisted her in the prosecution. The judgment was given for defendant, with costs, and his character was thus vindicated from the charge."

On June 13th the following letter written by the defendant appeared in *The Journal*:—

"SIR,—In your issue of the 4th instant you make some remarks about the case *Roux* vs. *Lombard*, which greatly need contradiction. Your statement is that there is 'such a state of things existing at Riebeck that should cause parents to watch more closely over the morals of their daughters'; but then you continue: 'the Dutch are singularly lax in this respect.' Now, sir, your statement shows how little you are acquainted with the Dutch and their manners; for they were and are still known as a people of good morals and principles, and that their young people are not allowed too much of freedom and liberty—much

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less, in fact, than the case with other civilised nations. But it seems as if the bad conduct and ill-behaviour of that characterless woman (plaintiff in the said case), and of those who have associated with her (as have been proved) gave you reason to suppose that we are entirely indifferent about the morals of our daughters; you are greatly mistaken. Plaintiff has been under strict discipline, and committed all these sinful acts without the knowledge of her guardians. Your remarks are thus an undeserved insult to us.

"J. F. LOMBARD."

This letter contained the alleged libel complained of.

King, for plaintiff: The words complained of are not true, and cannot be held to have been published in the public interest. Characterless is a strong expression, and the whole paragraph implies more than is justified by the evidence of plaintiff's misconduct with Lombard and her concealment of it from her husband. In any case, the words, even if true, are not in the public interest. The law on the point is laid down in *Botha* vs. *Brink* (3 Rose, 30), which distinguishes *Mackay* vs. *Philip* (1 Men. 463) from *Sparks* vs. *Hart* (3 Men. 3), and is to the effect that charges of immorality can be justified by proof of their truth if brought against any public functionary, but not when brought against a private person. All the later cases are decided on this ground; in the case of similar charges against clergymen, doctors, detectives, policemen, etc., their position is such that the publication of the truth about them has been held to be for the public interest, but there is no authority for saying it is so in the case of private individuals: *Michaelis* vs. *Braun*, 4 J. 205; *Rojesky* vs. *Ross*, 4 H. C. 128; *Graham* vs. *Kerr*, 9 J. 185.

Sampson, Q.C., for defendant: The plaintiff has herself made the facts public and invited comment. By bringing this case in the Magistrate's Courts she chose publicity, and cannot, as if she were simply a private individual, complain of her conduct being criticised: *Folkard on Libel*, 232; *Addison on Torts*, 183; *Hinwood* vs. *Harrison* (7 L. R. C. P. 606).

BARRY, J.P.: In this case the plaintiff sues the defendant for damages for libel, and the words complained of in substance are that the defendant wrote of the plaintiff that she

was a woman without character. The publication of these words arose out of a case tried in the Magistrate's Court here, and followed by a paragraph of comment in *The Journal.* In the case in the Magistrate's Court plaintiff gave evidence, and admitted that in early youth she had falsely stated a certain lad had made improper overtures to her, and also swore that at the time of her marriage she was with child by a man not her husband, and induced her husband to marry her without knowledge of this fact, and then after marriage claimed damages for seduction from this other man; in this action the Magistrate came to the conclusion that he could not accept her oath. These facts were thus made public property by the conduct of plaintiff herself. Subsequently a comment was made upon this case in *The Journal,* a Grahamstown newspaper; we need not now consider whether this comment was in every particular fair or accurate. It amounted to saying that this case showed a bad state of morality among the Dutch population, and that this particular instance of it was due to the conduct of defendant. Defendant replied to this by a letter to *The Journal,* of which the purport was that this comment was not fair either to the Dutch people or to the defendant, as the case was an exceptional one, and the immoral conduct of the woman was due to herself alone. The question now is, had the defendant a right in this letter to describe the plaintiff as a woman without character. Firstly, was this criticism true? Mr. *King* has virtually admitted its truth, and the statements of plaintiff on oath leave no doubt on the subject. Secondly, had the defendant a right to make this comment, and, in doing so, virtually to repeat what the plaintiff had said of herself? It is contended he had not this right, as it was private matter affecting the character of a private individual. Now if this were a private matter the argument would be sound, but as any matter brought before the public so as to invite criticism on it may be commented upon, I think the defendant was justified in his comments; the plaintiff made these facts public, and having done so cannot be heard to say that they cannot be repeated. The limitation to this is that if years afterwards these facts were to be repeated with the object of injuring the plaintiff that repetition might be made the subject of a successful action. The words now complained of

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amount to a fair comment, which the defendant had the right to make. I am surprised that such an action has been brought into Court; the law protects from criticism private conduct, sometimes even private misconduct, but I think plaintiff, having made these statements about herself, has no right to complain of the repetition of them under the present circumstances.

JONES, J.: I concur; I consider the evidence the plaintiff gave proves the truth of the words complained of, and that the comment was justified.

MAASDORP, J., concurred.

[Plaintiff's Attorneys, STONE & SON.
Defendant's Attorneys, BELL & HUTTON.]

RICHARDSON *vs.* RICHARDSON.

Costs—Petition—Rule nisi.

Where a rule nisi *had been granted calling on respondent to show cause why he should not give security for payment of a certain debt, and why he should not pay the costs of the application, but the petition on which the rule was granted contained no prayer for costs, the Court in making the rule absolute, Held, by a majority* (BARRY, J.P., *dissent.*) *that applicant should be allowed her costs.*

1895. Nov. 19. — Richardson *vs.* Richardson.

This was an application to make absolute a rule *nisi* granted on the 7th October, 1895.

The rule called on the respondent, Charles Richardson, to show cause why he should not give security for the payment of a promissory note for £40 made by him in favour of Mary A. Richardson (the applicant) on the 3rd March, 1895, and due on the 3rd March, 1896, on the ground that he was about to leave the jurisdiction, and why he should not pay the costs of the application; this rule to operate as an interdict restraining him from parting with a wagon and sixteen oxen, his property, in the meantime. The original petition, on which the rule *nisi* was obtained, stated that respondent had on 3rd March, 1895, made a promissory note for £40 cash advanced in favour of the applicant, who is

his mother; that this was unsecured, and that respondent owned two wagons and thirty-two head of oxen, and that applicant believed he was going to fly the country. This petition did not contain any prayer for costs.

An affidavit of respondent's was read, dated 9th November, admitting that he intended to leave the country, and that he had received notice on August 7th of this application, but stated that he had paid all his creditors, and would have made arrangements for the payment or renewal of this promissory note before leaving; that on the rule *nisi* being issued, respondent had offered two securities, which were approved by the deputy-sheriff, but rejected by applicant, and that afterwards, on October 14th, he had paid into the Standard Bank, at King Williamstown, sufficient funds to meet the note at maturity; that respondent was joint heir (with eight others after his mother's death) to the joint estate of his mother and her deceased husband, which estate was worth at least £1800; that the application was unnecessary, and brought about by ill-will on his mother's part, caused by certain evidence, which respondent had given at the Circuit Court at the end of March, against one Kraus, and by accusations of improper conduct with this Kraus, which he had made against applicant; that costs had not been asked for in the petition and should not be allowed.

An answering affidavit of applicant's stated that, by the advice of her attorney, she had evicted respondent from a farm owned by her, and that it was after this he had brought the accusations against her, which were untrue; also that he had said she "might whistle for her money."

Blaine, for respondent: Security has already been given, but I appear to resist costs being given against us. No costs were asked for in the petition, and consequently should not be granted. *Van Zyl's Judicial Practice* 352 and *Smith* vs. *Gabier*, there cited.

[*Per Curiam.* That might be so if notice of the application were given respondent; here could not the Court amend the petition so as to include a prayer for costs?]

The rule is stated as applying to rules *nisi*. In any case in view of respondent's inheritance, the application was unnecessary, and costs should not be allowed.

Maasdorp, S.-G., for applicant: Respondent admits he

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was leaving the country permanently, and it's plain he was doing so to evade payment. Consequently, the application was necessary. His share in the inheritance is no security; it is a vested interest, which he might dispose of at any time.

BARRY, J.P.: In this case we are all agreed that the application should be granted, but on the question of costs I am not in accord with the majority of the Court.

If this application had been made to me in Chambers or in Court on a petition, where there was no prayer for costs, I would (the respondent practically consenting) have granted the order as to finding security, but I would not have called on respondent to show cause why he should pay costs not asked for in the petition; and this I take to be the ruling of the Supreme Court in *Smith* vs. *Gabier*. We should, therefore, regard this application as if it were before us in the first instance, and made after notice, on a petition without any prayer for costs, and refuse costs.

I consider, moreover, that the applicant, in applying *ex parte* and concealing the fact that respondent was joint heir to the joint estate of herself and husband, valued at £1800, did not act with perfect *bona fides*.

In consenting to find security, the respondent continues to deny any intention of flight. I do not think that the respondent meditated leaving the Colony in order to evade the payment of this or any other debt. He was leaving solely with the object of bettering himself elsewhere. There is no evidence, nor suggestion in evidence, that respondent meant to dispose of his inheritance, dependent on the property in the possession of applicant, and which would thus have remained available to satisfy this debt.

In these circumstances I cannot regret that I must refuse the applicant her costs, because she has not asked for them in her petition.

JONES, J.: I consider that in this case the applicant should be allowed her costs. When the application came before me in Chambers, I was impressed by the statements that the respondent was leaving the country, and was leaving nothing behind. He had a wagon and oxen, and these he intended to remove, and he does not himself lay

any stress on the property which would vest in him on the death of his mother. Further, he admits that, on August 7th, he received a demand to give security for this debt, and does not allege that he sent any reply to it; but his mother states that he said he was going to leave the country, and that she might whistle for her money. If he threatened her in this way (and it appears probable), and if she thought that he really meditated flight, and if after first service of notice he tendered no costs, then I consider she was justified in making this application. He was leaving, and leaving nothing behind which could be dealt with under an order of this Court, as his domicile would be changed, and as far as we know, there is no real property registered in his name in the Colony. Under these circumstances he cannot complain that the applicant thought his position made it necessary for her to apply for protection; he must be judged by his own statement. I consider the application ought to be allowed with costs.

MAASDORP, J.: I concur with my brother Jones.

The application was accordingly allowed with costs.

[Applicant's Attorneys, BELL & HUTTON.
Respondents' Attorneys, STONE & SON.]

MEINTJES *vs.* THEUNISSEN.

Magistrate's Court—Costs—Rule 29*—Cancellation of Judgment.*

Where M. sued T. in the Magistrate's Court and obtained provisional judgment, and M. subsequently discovering that the summons, under which judgment had been given, was irregular, gave notice to T. that he would apply to the Magistrate to have the judgment annulled, and T., notwithstanding this notice, applied under Rule 29 *to have the case re-opened, and it was re-opened, and the judgment reversed,* Held, *that the Magistrate was wrong in ordering M. to pay T.'s costs in the suit.*

SEMBLE—*A Magistrate's Court or a Superior Court has power to annul its own judgment, if it is made to appear that it has been given on a complete misconception of the facts.*

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Meintjes *vs.* Theunissen.

This was an appeal from a decision of the Resident Magistrate of Colesburg.

On the 24th September, 1895, John Charles Meintjes (appellant) took out a summons against Marthiuus Theunissen (respondent) in the Magistrate's Court at Colesburg, for £2 15*s.* 7*d.*, balance of account. On the 3rd October, provisional judgment was given in favour of plaintiff, the defendant not appearing. Subsequently Meintjes discovered that there had been two irregularities with regard to the summons: (1) The copy served on defendant was defective, as not mentioning any return day; (2) The return day stated in the original summons was the 3rd October, and a copy was not served on defendant till the 30th September, whereas it should have been served six days before the day of appearance. Meintjes, on the 17th October, served a notice on Theunissen, stating that on the 4th November application would be made in the Magistrate's Court to have the judgment declared null and void, on account of these irregularities. On the 18th of October, Theunissen, through his attorney, took out a summons under Schedule B., Act 20 of 1856, calling on Meintjes to show cause, on the 28th October, why this judgment should not be reversed. On the trial of this case on the 28th October, Meintjes objected to the case being re-opened, on the ground that none of the reasons mentioned in Rule 29 applied, but this objection was overruled, and the case re-opened. Theunissen then excepted to the original summons, on the grounds that no return day was stated in the copy served on him, and that, according to the return day of the original summons, there was not sufficient notice. These exceptions were sustained, and judgment entered for the defendant in the original suit (Theunissen) with costs.

From this decision Meintjes now appealed.

Maasdorp, S.-G., for appellant: The Magistrate was wrong in holding this case came under Rule 29. This rule only applies where a defendant has been properly summoned,

not where service has been irregular, as here. In *Blom* vs. *Swart*, 8 E. D. C. 111, Rule 29 was held not to apply to the facts of that case, which was similar to this. The proper course was for either party to apply to the Magistrate to annul the judgment. A Court can always re-call its own final order: *Ritchie* vs. *Andrews*, 2 E. D. C. 254. Procedure by notice for this purpose was sufficient without summons: *De Beers* vs. *Rose*, 10 J. 48.

Sampson, Q.C., for respondent: The case came rightly under Rule 29, which applies to cases where defendant has been properly summoned, and *à fortiori* to cases where he has not.

[*Per Curiam.* Could you not have appeared on the 4th November and consented to the judgment being annulled? and if so, can we hold the Magistrate was right in allowing you the costs of these proceedings?]

The Magistrate could not have reversed the judgment on the notice for the 4th November; having once given judgment, he is *functus officio*, and cannot reverse it at the successful parties' instance: *Pearse* vs. *Medefindt*, 4 E. D. C. 327. In *Ritchie's* case, the reason for annulling it was a great deal more than a mere irregularity in the summons.

BARRY, J.P.: This case has occupied some time, and has given rise to some ingenious argument, but when it is looked at from a common sense point of view, there is only one conclusion that can be arrived at, and that is that Theunissen, the respondent, has been very badly advised in adopting the course he has. He was sued in the Magistrate's Court of Colesburg, and the service of the summons was irregular, in that it was not served on him sufficiently long before the time specified (in the original summons), for his appearance in Court, and there was also another irregularity, as the copy served on him did not specify any time for his appearance. Consequently the judgment given against him was wrong, and the plaintiff, on discovering this, gave respondent notice that he would treat it as such, and would apply to the Magistrate to let it disappear as a judgment, thus leaving the parties *in statu quo*. One would expect the defendant to be satisfied with this, but two days after he received this notice, he himself took proceedings under Rule 29, and tried to have the judgment set aside, and the

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Magistrate, on his application, came to the conclusion that it ought to be set aside, and made the plaintiff pay the costs of the proceeding. The question for our decision is whether the Magistrate was right in all he did; that is, had he power to make this order setting aside the judgment, and if so, did he exercise a judicial discretion in ordering the plaintiff to pay costs? On the first point, the Solicitor-General says he had no such power, as Rule 29 only applies to cases where the defendant has been legally served, and has, nevertheless, been unable to be present at the time of trial. I am not prepared, now, to say that this contention is wrong; for the decision of this case it is not necessary to express any opinion upon the point. Whether he was right or wrong there, I am quite sure he was wrong in making the plaintiff pay costs. He would have exercised a discretion in making no order as to costs, but in making the plaintiff pay them, he did not. The defendant had notice, before he took any proceedings, that the judgment would be treated as null and void, and that the Magistrate would be asked to declare it so; and with these facts before him, the Magistrate must be taken to have known that respondent's action was quite unnecessary. It has been argued on the other side, that a judgment once given cannot be set aside without further judicial proceedings, but I am not prepared to say that this cannot be done by consent. There is strong authority for saying that where a Court gives a judgment, based on a total misconception of the facts involved, the Court may, independently of Rule 29, treat this judgment as a nullity. The Supreme Court will, by consent of parties, amend its judgments; if Mr. *Sampson's* argument were correct, this could not be done without an appeal to the Privy Council, as no alteration in a judgment could be made, except by a Court of Appeal, or under the provisions of a special statute. In my opinion, the Magistrate was right in treating his previous judgment as a nullity; he had power to do this quite independently of Rule 29, and this portion of his judgment will stand; his decision as to costs will be set aside, as in this he did not exercise a judicial discretion, and each party will be ordered to pay their own costs in the Court below; respondent to pay costs of appeal.

JONES, J.: I concur on the ground that the Magistrate

could, quite independently of Rule 29, set aside his judgment, when he found it was based on a misconception of the facts. Plaintiff could move to have it set aside for his own benefit, and was not obliged to wait for defendant to initiate proceedings. Consequently, defendant's application was quite unnecessary, and he should not have been allowed his costs.

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MAASDORP, J., concurred.

[Appellant's Attorneys, T. B. VAN DER RIET. Respondent's Attorneys, STONE & SON.]

YATES *vs.* ELLIOTT.

Costs—Taxation—Bill of costs—Magistrate's Court.

Where a summons in the Magistrate's Court claimed payment of a bill of costs due to plaintiff (an attorney) for appearing for defendant on a criminal charge before a police officer and afterwards before a Magistrate, and defendant excepted on the ground that the bill was furnished in a lump sum and no particulars given, and also that it was untaxed, Held, *that neither of these exceptions could be sustained.*

1895. Nov. 21. — Yates *vs.* Elliott.

This was an appeal from a decision of the Acting Resident Magistrate of Maraisburg.

J. J. Yates (the appellant and plaintiff in the Court below) sued John Elliott (respondent) a sergeant in the Cape Police for £7 7*s.*, "being an amount due and payable by defendant to plaintiff for certain professional services rendered at his request as his attorney in December, 1893, as per account annexed." The account was as follows:—

"*December*, 1893.

"To sundry attendances upon you *re* your defence for insubordination. Defending you before Inspector Tainton, and thereafter at R. M. Court. Correspondence, &c.

"£7 7*s.*"

To this summons the defendant excepted: (1) That the account does not set forth any items or dates on which the specific services were rendered; (2) That the account is a bill

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of costs which is not taxed. The Magistrate sustained both exceptions, saying as to the first, "Defendant is justified in refusing to pay unless a proper account is rendered. The bill must contain sufficient information to enable him to take advice on it, and the items must be set forth in detail and not lumped together; see *Van Zyl on Costs*, p. 19, and *Cook* vs. *Gillard* (1 E. & B. 33), there quoted."

King, for appellant: The second exception is plainly wrong, as there is no such thing as taxation between attorney and client in the Magistrate's Court, or in criminal cases in any Court: *Manby* vs. *Williams* (5 Jut. 183); *Ganangana* vs. *Potter* (7 E. D. C. 201). As regards the first exception, it is not a matter for exception at all, but even if it were the account is quite sufficient and follows the universal practice in this country in charging a lump sum for criminal work. The rule quoted from Van Zyl may be correct (though not supported by the decision in *Cook* vs. *Gillard*, which rather establishes the reverse, and in any case was decided under an English statute), but must be limited to cases where a bill is taxable and consequently particulars are necessary.

There was no appearance for respondent.

BARRY, J.P.: The appeal must be allowed and the two exceptions overruled. If defendant wanted particulars of the items in the account he could have asked for them and they would have been furnished. As to the supposed necessity for the taxation of this bill before action taken, it is disposed of by the cases quoted.

JONES and MAASDORP, JJ., concurred.

[Appellant's Attorneys, BELL & HUTTON.]

HAYTER *vs.* FORD.

Contract—Breach of contract—Cancellation of lease.

Where H., who had a lease of F.'s farm met F. and said, "Will you consent to cancel our lease," and F., three days afterwards meeting H., said to him, "I will take you at your word and cancel the lease," but no further arrangement was come to as to the time and conditions of the cancellation, and H. ended this second interview by declining to cancel at all, Held, *there was no unconditional offer to cancel on the part of H. which F. could, by accepting, make into a complete contract.*

Where H., on taking a lease of F.'s farm and garden, agreed that Mrs. F., F.'s mother, who had a right to claim from F. residence on the farm, should continue to have the right of residence in a house on the farm and the right to farm produce, including vegetables and fruit necessary for household purposes, Held, *that H.'s conduct in allowing his stock constantly to occupy the enclosure round this house, and in neglecting to cultivate the garden so as to furnish a supply of vegetables, was a frustration of a substantial part of the contract, and gave F. a right to claim the cancellation of the entire contract.*

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This was an action in which the plaintiff, John Atherstone Hayter, claimed from the defendant, Frank Stranshan Ford, the sum of £20 13*s.* 9*d.*, being money paid for and on behalf of defendant at his request on or about January 3rd, 1894; this sum was one half share of the half-yearly interest on a mortgage on portions of the farms Oakwell and Dornkloof, owned by defendant and leased by him to plaintiff, one condition of the lease being that plaintiff and defendant should each pay half the interest as it fell due.

Defendant, in his plea, admitted the payment on his behalf, but said that defendant was entitled to one half share of the profits of the farming operations carried on on the above farms, that it was agreed that plaintiff should repay himself the said sum of £20 13*s.* 9*d.* out of defendant's share of these profits, that on June 30th, 1895, defendant's share amounted to £30 6*s.* 4½*d.*, and that in July last plaintiff rendered to defendant an account in which he debited defen-

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dant with the sum of £20 13*s.* 9*d.* now claimed, and after debiting the business with all charges due by it showed a balance of £1 12*s.* 7½*d.* in defendant's favour, and that consequently the said sum had been paid in full.

As a plea in re-convention, defendant prayed that plaintiff should be condemned to give him possession of the portions of Oakwell and Dornkloof occupied by plaintiff under a written agreement of lease terminating on November 3rd, 1905, on the ground that an agreement had been entered into between plaintiff and defendant whereby it was agreed to cancel the said agreement. And failing this defendant claimed cancellation of the said written agreement and £100 damages, alleging the following breaches of the agreement by plaintiff: (a) whereas it was agreed that plaintiff should stock the said farms with as much stock as it could conveniently carry and should use all diligence in farming the same, the plaintiff had wholly failed to stock the farms in terms of the said agreement; (b) it was further provided by the said agreement that the defendant's mother, Mrs. John Henry Ford, should have the right to continue to reside on the farm Oakwell in the house at that time occupied by her, and should have the right to claim from the plaintiff such farm produce, amongst other things, vegetables and other farm produce, as she should require from time to time; and that plaintiff has wholly failed to carry out this agreement, and has continually interfered with Mrs. Ford's quiet enjoyment of her said rights so as to make her continued residence upon the said farm intolerable, and has converted the enclosure around her said house and the vegetable garden into paddocks or camps for his horses, ostriches, and other stock, and has wholly failed to cultivate the said garden or to supply Mrs. Ford with vegetables or other farm produce.

Defendant also claimed an account, duly supported by vouchers, of the farming operations carried on by the plaintiff, and payment of such amount as upon such account should be found to be due.

At the commencement of the case defendant asked and was granted leave to amend his claim in re-convention by adding as an additional cause for cancellation the following clause: (c) "the plaintiff further agreed to keep an account of all transactions appertaining to the farming of the said portions of Oakwell and Dornkloof, and to allow the defen-

dant to have access from time to time to such accounts, but has utterly failed to keep any accounts referring to the said transactions." Plaintiff in his replication admitted the various conditions of the agreement, but denied that he had committed any breach of them, and denied that he had agreed to cancel.

From the evidence it appeared that plaintiff and defendant, who were brothers-in-law, on the 4th of October, 1894, entered into a written agreement, by which those portions of the farms Oakwell and Dornkloof which belonged to defendant, were to be leased to plaintiff for a period of ten years on shares, viz., on condition that plaintiff should stock the farm and superintend and manage his farming operations, and that the profits arising from such stock and all other profits should be equally divided between the plaintiff and defendant. The material provisions of this agreement were the following:—

"(2.) The said John Atherstone Hayter agrees to find live stock, which shall remain his property, by any means which may be most advisable for the purpose of stocking the said farm. . . .

"(4.) And agrees to use all diligence in procuring stock and in farming the same to the best of his ability, and further agrees to keep an account of all transactions appertaining to the farming of the said portions of Oakwell and Dornkloof, and to allow F. S. Ford, or any one appointed by him, to have access from time to time to said accounts; and

"(14.) Undertakes to stock the said farm during the said term with as much stock as the same can conveniently carry.

"(9.) The said John Atherstone Hayter agrees to pay half the interest on the mortgage on the said portions during the term of this agreement, provided that the money so paid by the said Hayter shall be refunded to him at the expiration of the term of this agreement by the said F. S. Ford, free of interest.

"(10.) It is also agreed that Mrs. John Henry Ford shall continue to have the right of residence at the house at Oakwell, and shall have the right to farm produce, such as vegetables and fruit, also wood and all other farm produce necessary for household purposes. . . ."

This agreement was signed on October 4th, and plaintiff, who had been for some weeks living on the farm, then took over the management of it. There was a mortgage on the farm of £1500, and the next half-yearly payment of interest to the amount of £41 7*s.* 6*d.*, was due on December 31st. According to plaintiff's account, defendant came to him early in December, and asked him if he could get his father

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to lend him (defendant) this amount; plaintiff thought his father would refuse, and finally agreed to pay the whole £41 7*s.* 6*d.* himself, and to retain, as security for defendant's share of it, fifteen cattle belonging to defendant which were running on the farm. Plaintiff paid this sum, and now sued for £20 13*s.* 9*d.*, the portion of it due by defendant. Plaintiff said they had a further conversation in January about the instalment falling due on June 30th, and that it was agreed that it and all further instalments should be paid in full by plaintiff, who was to deduct defendant's portion of the payment from the farm profits due to him. Defendant, on the other hand, said that in December they agreed that the first instalment should be paid out of farm profits, and denied that he had given the cattle as security, and said that he had made no arrangement with plaintiff or any one else for the payment of the June instalment. Some of the fifteen cattle, it was admitted by both sides, were sold from time to time by defendant with plaintiff's consent, and the remainder, seven or eight in number, remained on the farm at Oakwell till September, 1895, when they were driven off by defendant to his brother's farm, plaintiff protesting against it. On June 26th, the full amount of interest, £41 7*s.* 6*d.*, was handed by plaintiff to an agent at Grahamstown to be sent to the mortgagee at Cape Town, and the mortgagee's receipt for this bore date July 23rd, 1895. On July 6th, plaintiff furnished defendant with the following account dated June 30th:—

Statement of farming carried on by the undersigned on the farms Oakwell and Dornkloof in conjunction with Mr. J. S. Ford as per agreement, from the 4th of October to the 30th of June, 1895:

Debits.	£	*s.*	*d.*	*Credits.*	£	*s.*	*d.*
Paid interest on Mortgage	41	7	6	Sheep grazing	25	0	0
Cash paid A. L. Benjamin	8	0	0	Cattle „ / Birds „	7	10	0
Less my half share balance	9	12	7½	Sale of ostrich feathers	18	12	9
Balance on hand, 30/6/95	1	12	7½	Ostrich chicks sold	7	4	0
				Butter sold	2	6	0
	£60	12	9		£60	12	9

(Signed) J. A. Hayter.

Defendant accepted this balance of £1 7*s.* 7½*d.*, asking at the same time by letter for an opportunity of examining the accounts, vouchers, etc. In the meantime, considerable friction had arisen between plaintiff, who was living on Dornkloof, and Mrs. Ford, defendant's mother, who was living on Oakwell, the adjoining farm, which was also leased to plaintiff. On August 3rd, plaintiff met defendant, and they talked over these disagreements. At the end of their conversation, plaintiff said, "Look here, Ford, are you sorry you entered into this agreement?" and again, "Will you consent to break it?" Plaintiff said defendant made no reply to this, but defendant said that he answered that he would give a reply the next Monday or Tuesday. On Tuesday, August 6th, plaintiff again met defendant at Mrs. Ford's house, and they had a conversation of which they gave different accounts. Defendant's account was that he said to plaintiff, "Hayter, I went to see you yesterday, to tell you that I agreed to your proposal to cancel the lease; there will, however, be details to be arranged, and we can either each appoint an arbitrator, or allow Mr. George White to be sole arbitrator"; to which plaintiff replied, "All right, I think Mr. White would be a very fair man." Plaintiff then said, "Will you allow the agreement to last six months longer?" and defendant said, "No; you have made such a mess of the place you must go at once." Plaintiff then said, "You've misunderstood me, I did not intend to break the agreement in this abrupt way"; and defendant replied, "There's no other construction to put upon your words except what I've put on them, and I'll hold you to them." Plaintiff's account of this interview, was that he had only agreed to Mr. White as an arbitrator to decide on the interpretation to be put on his conversation of the previous Friday, and that on the Tuesday he had said nothing intimating a desire or willingness to cancel.

With regard to the stocking of the farm, defendant alleged in his plea that the farm would carry 2000 sheep, 50 ostriches, and 70 head of cattle. It was proved that at the beginning of his tenancy, plaintiff let grazing for 1000 sheep to Mr. White (continuing an arrangement already in force between White and defendant), and also grazing for 80 or 90 head of cattle to one Cummyng. He had besides on the farm, 150 sheep of his own, and about 850 which he

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took on lease at 1*s.* 6*d.* a head, the profits from wool and increase to belong to him; he had also on the farm 30 ostriches of his own. It was admitted that these stock were numerically sufficient, but defendant contended that the agreement required that all the stock on the farm should be plaintiff's own property.

With regard to the clause in the agreement relating to old Mrs. Ford, it appeared that there was an enclosure round the house set apart for her, and that from the time of plaintiff's arrival on the farm, this enclosure was constantly overrun by ostriches, sheep and cattle; the front gate of this enclosure had been removed, presumably by plaintiff's orders, and had never been replaced. Plaintiff had also cut aloes for his ostriches inside this enclosure, and on Mrs. Ford remonstrating, had said, "You have no right to a blade of grass in the enclosure." The garden had never been properly kept up during plaintiff's tenancy, and except on about a dozen occasions in January, no vegetables had been supplied to Mrs. Ford. Plaintiff explained the absence of vegetables in the garden by the prolonged drought, but there was evidence that the garden, which was an extensive one, had a constant supply of water. Mrs. Ford's daughter, who kept house for her, admitted that she never personally complained to plaintiff of the want of vegetables, preferring, owing to disagreements between them, to get vegetables from the neighbouring farm of George Ford, rather than to have any dealings with plaintiff.

There was evidence that, after the letter which defendant wrote asking permission to examine the farm accounts and vouchers, he made the same request personally to plaintiff, who replied that he had nothing to show him beyond this account. Plaintiff's books, when produced in Court, contained merely the entries furnished in this account, and he did not produce any vouchers.

King, for plaintiff: It is clear that plaintiff paid two sums of £20 13*s.* 9*d.* on behalf of defendant, one of which was repaid out of farm profits, and the other is still due. If, as defendant says, the first payment was included in the account of June 30th, the declaration can be amended so as to claim the second sum, but it is plain from the transaction about the cattle given as security that it is the first sum

that is really due. There was no agreement to cancel, even on defendant's own showing there never was a definite agreement, the time and conditions not being settled, and defendant concluded each interview by altogether declining to cancel. The farm was sufficiently stocked; the words in the agreement, "which shall remain his property," only means that as between plaintiff and defendant defendant was to set up no claim to the ownership of the stock; that leasing sheep, etc., was contemplated was proved by the words, "by any means which shall seem advisable." With regard to Mrs. Ford, defendant's stock trespassing on her enclosure does not amount to a breach of the agreement; it was not done wilfully by him, and she never impounded the stock, nor took any steps towards testing her right to the sole use of the enclosure. She was supplied with vegetables whenever there were any, and had waived her right by never complaining or asking for any. In any case, neither of these breaches can be looked on as an entire frustration of the contract, or as giving a right to its cancellation (*Addison on Contracts*).

The accounts are not very complete, but sufficient for the purpose, and defendant never went to examine them, nor complained of them till the first day of trial.

Maasdorp, S.-G., for defendant: The account of June 30th shows that the amount claimed in the declaration has been already paid; besides, an account properly supported by vouchers might show much larger profits. Plaintiff's whole conduct showed a consent to cancel, and he expressed this at the second interview of August 6th. The agreement requires the stock on the farm to be plaintiff's property. What advantage would defendant get from leasing his farm for the purpose of being let for grazing or supporting merely leased stock? There had been a complete breach of an essential part of the contract with regard to Mrs. Ford; and as to the farming accounts, which plaintiff had agreed to keep, there simply were not any.

BARRY, J.P.: It appears that the defendant is the registered owner of one portion of the farms Oakwell and Dornkloof, in extent about 2200 morgen. This portion he got by inheritance from his father, and his mother, who is still alive, had originally a life-usufruct of the property. Some

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years ago, however, defendant wished to mortgage the farm, and for this purpose his mother consented to relinquish her life-usufruct, retaining, however, for life, the right of residence in Oakwell House, and other privileges similar to those reserved to her in the contract with which we have to deal, though perhaps more fully expressed. In September, last year, defendant decided to let this farm to plaintiff, and did so, the terms of the lease being reduced to writing in the contract dated October 4th, 1894. The most important provisions of this contract are those by which plaintiff "agrees to find live stock, which shall remain his property, by any means which may be most advisable for the purpose of stocking the said portions of Oakwell and Dornkloof, and that the profits arising from such stock and all other profits shall be equally divided between the said F. S. Ford and J. A. Hayter," and "to stock the said farm during the said term with as much stock as it can conveniently carry," and again, plaintiff agrees "to use all diligence in procuring stock and in farming the same to the best of his ability, and further agrees to keep an account of all transactions appertaining to the farming of the said portions of Oakwell and Dornkloof, and to allow the said F. S. Ford, or any one appointed by him, to have access from time to time to such accounts"; that by which "the said J. A. Hayter agrees to pay half the interest on the mortgage on the said portions of Oakwell and Dornkloof during the term of this agreement, provided that the money so paid by the said J. A. Hayter shall be refunded to him at the expiration of the term of this agreement by the said F. S. Ford, free of interest"; and that by which it is agreed "that Mrs. John Henry Ford shall continue to have the right of residence at the house at Oakwell, and shall have the right to farm produce, such as vegetables and fruit, also wood and all other farm-produce necessary for household purposes, with the exception of meat."

Plaintiff in his declaration sets forth only the part of the contract referring to "interest," and alleges that he has paid, not merely the portion due by himself, but also two instalments due by the defendant, and that he has received from the defendant repayment of only one of these instalments, as his account shows. Defendant replies that if a proper account were furnished that would not be so, but a sub-

stantial balance would be shown to be due to defendant from the profits of these farming transactions; that the proper course is, after cancellation of the contract, to have the whole matter of accounts gone into, and see on which side the balance lies. But the most important issue is that raised by the claim in re-convention, viz., whether the defendant can claim the rescission of this contract. This is claimed on several grounds, which I shall deal with separately. First, it is said that there was a mutual agreement to cancel this contract. It is sufficient to say that the evidence does not bear out this contention. There was no unconditional offer on the part of the plaintiff which the defendant could, by accepting, bind the plaintiff. At most, there were discussions about cancellation, and during the second of these discussions the plaintiff expressed his unwillingness to cancel. Then it is contended that the plaintiff has committed a breach of the agreement in that he has failed to stock the farm with as much stock as it could conveniently carry. Now the evidence shows that, as far as the mere number of stock is concerned, there were as many running on the farm as the defendant in his plea says the farm could carry. The defendant, however, says that these were not running there under the conditions stipulated. His construction of the agreement is that the farm should be stocked with stock that were Hayter's absolute property, and not (as was the case) with stock some of which were hired by Hayter, and some the property of White and Cummyng, who paid so much a year for grazing rights. Defendant relies on sect. 2, which provides that Hayter "shall find live stock, *which shall remain his property*, by any means which may be most advisable," and says that this section precludes Hayter from stocking the farm with any stock except such as belonged to Hayter himself. Without expressing any opinion as to whether this section would in any circumstance be incapable of bearing this construction, or (as plaintiff suggests) whether it means that defendant shall have *no* right to claim any property in the stock brought there by Hayter, I need only say that, taken with their surroundings and all the circumstances of the case, these words certainly cannot bear defendant's construction. Before this contract was made, Ford had entered into an agreement with White, by which White hired grazing on

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the farm for a whole year. This contract with White was taken over by Hayter with Ford's knowledge, and it is now impossible for Ford to contend that White's agreement with Hayter was a violation of the contract. It is further contended that Hayter had no right to stock the farm with hired stock, but if this hired stock was for the joint benefit of the partners, and Hayter out of his separate funds paid the rent, I do not think it can be said that such hiring was forbidden by the contract. Defendant cannot, therefore, succeed on these grounds. When we come, however, to deal with the clause of the contract affecting old Mrs. Ford, we have evidence proving a breach of that part of the contract. Plaintiff was obliged to allow Mrs. Ford the exclusive use of the house and residence at Oakwell, and this meant, not merely bare residence, but a right to the adjuncts or enclosure round the house set aside for Mrs. Ford, and formerly part of the premises. Plaintiff was also obliged to supply Mrs. Ford with vegetables from his garden. This meant, not merely to supply her with vegetables in case there happened to be any in the garden, but that Hayter was to grow and supply sufficient vegetables for Mrs. Ford's domestic use. It is clear that these obligations were not fulfilled; during almost the whole of plaintiff's tenancy the garden was not planted, and was utterly destitute of vegetables, although if properly worked that garden would have afforded, not only a supply sufficient for all domestic purposes, but also a surplus for profitable sale by Hayter on the market. Plaintiff acted as if he thought that if there were no vegetables in the garden his obligation to supply any ceased. He also seems to have thought that he could pen the old lady within the walls of the house by allowing the enclosure to be occupied by his ostriches, sheep, and cattle. This was conduct which operated as an entire frustration of a substantial part of the contract, and plaintiff's action with regard to this lady in trying to make her continued residence in the house impossible by confining her to the walls of the house, and also in depriving her of the vegetables to which she had a right, proves a violation of the contract, which gives defendant the right to claim its cancellation. Besides this, plaintiff has utterly failed to keep a proper account of all transactions appertaining to the farming operations. Under these circumstances we are of opinion

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that the contract must be cancelled. With regard to plaintiff's claim in convention for money paid on behalf of defendant, we give no decision on that point now, but will refer the matter to Mr. George White to frame an account showing the balance due by either party to the other, and to report thereon to this Court. We direct Mr. White to consider that £82 15s. is due by the defendant to the plaintiff as a payment made by plaintiff for and on behalf of the defendant. Both parties are to be allowed to prove any further credits or debts, but in framing such account the rent paid or agreed to be paid by the plaintiff for the sheep hired shall not be charged against the joint estate. The question of costs to stand over.

JONES and MAASDORP, JJ., concurred.

[Plaintiff's Attorneys, STONE & SON.
Defendant's Attorneys, BELL & HUTTON.]

WIBLIN *vs.* WEBBER.

Negligence—Contributory negligence—Accident—Horse.

Where defendant was in the habit of allowing his horses to remain with harness on, but without bridle or halter, loose in a yard open to the street, and one horse so left loose suddenly bolted, through an unused door, from the yard into an unfrequented lane, and thence into the main street, and there collided with and upset a cart in which plaintiff was driving, Held, *that defendant was guilty of negligence, and was liable to plaintiff for damages for the injuries he had received in consequence of being thrown out of the cart.*

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In this case, Albert Wiblin, a butcher residing in Port Elizabeth, claimed from William Webber, a carrier also of Port Elizabeth, £1000 damages, in that the defendant, by himself or his servants, carelessly and negligently left a horse belonging to him, which was at the time harnessed, but without any bridle or blinkers on, loose and unattended in certain premises belonging to defendant; in consequence of which negligence, the horse escaped into the public

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thoroughfare, and rushed into and collided with a cart in which plaintiff was at the time driving, whereby the plaintiff was thrown from the said cart to the ground, and was seriously and permanently injured in health and body. The defendant in his plea admitted that a collision took place between a cart in which plaintiff was seated, and a horse belonging to the defendant, but denied being guilty of negligence, and further said that the cart on which plaintiff was seated belonged to and was driven by one Buchanan, and that the said cart was so recklessly, negligently, and unskilfully driven as to contribute directly to and cause the said collision.

From the evidence it appeared that Webber, the defendant, is a carrier, and employs in his business some twenty horses, which are kept in a stable in a yard, the main gate of which opens on S. Union Street. The yard is a large one, and, besides the main gate in front, has in the back a small door, four or five feet broad, which has never been used for the ingress or egress of horses; and, in fact, was never used by defendant at all, but only by the tenants of a small cottage belonging to him, who used it for coming in and out of the yard. This door, which was usually kept shut, but on the day of the accident was open, leads into a narrow lane, which in turn leads into Walmer Road, a street crossing S. Union Street at right angles. According to the evidence of Edward Johnson, a driver in Webber's service, he was driving the horse which caused the accident from six till one on September 27th, carting sugar in a wagon, with it and another horse. He had driven this horse for thirteen months, and known it for a year longer; it was a gelding, aged, and always a quiet horse. On that day, about one o'clock, he outspanned his wagon in the road, some hundred yards from the stable, and then rode one horse up to the stable, the other (the horse in question) following behind. When they came into the yard he removed the bridle and blinkers from both horses, leaving their other harness on, and they went of themselves to the trough to water, while he went into the stable to cut forage. This was the course adopted for years with all the horses in the yard; after watering they used always to stale in a particular part of the yard, and then, of their own accord, come into the stable, where they were tied with a halter. On this day his were

the first horses to return, so there was no other driver or groom in the yard. The two horses, after watering, etc., came as usual to the stable door, and as he paused to hitch up the breeching on one horse, he saw that the other had gone back again to the trough. While there, he saw it commence to kick up playfully and run about the yard. He tried to catch it, but the horse ran into the corner where the small door was, and kicked so violently there that he could not approach it, and finally passed through the gate into the lane. Witness had never known a horse to pass through this gate before, neither had he ever known this horse to behave as it did on the day in question, and concluded that a bee or other insect must have stung it. He said that even if the horse had had a halter on, he could not have caught it, as it was kicking so violently as to be unapproachable in the narrow corner it had run into; he admitted, however, having said in the Magistrate's Court (in an action brought by Buchanan against the present defendant for damages arising from the same accident) that if the horse had had anything on his head, he could have caught it. Defendant admitted that the custom of leaving the horses to water by themselves without bridles was the usual custom in the yard, and was carried on with his approval; the main gates of the yard were never shut while the horses were thus loose in the yard.

As regards the other facts of the case, there was some conflict of evidence. It was admitted that the runaway horse, with no bridle on, but with heavy wagon harness, including an iron chain, ran into Walmer Road, and turning the corner there into S. Union Street, ran at full speed down the street, in the direction leading to the front gate of the stables. About eighty yards from the Walmer Road corner, Pier Street (parallel to Walmer Road) also intersects S. Union Street, the corner house in Pier Street and S. Union Street being Hartel's shop. In front of Hartel's shop the runaway horse collided with a baker's cart belonging to and driven by one Buchanan, on which Buchanan's little son and the plaintiff were sitting. The witnesses agreed that at the moment of collision, the cart was just drawing up, or was just drawn up, at Hartel's shop, facing up the street, down which defendant's horse was

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coming, with its left wheel touching the pavement, the horse's head a little over the pavement, and the cart at an angle of about thirty degrees to the pathway. The runaway horse struck the cart about the front of the right wheel, and all the occupants were thrown to the ground, the plaintiff being the only one seriously hurt. There was a variance as to the movements of the cart and the horse just before the collision. Plaintiff's witnesses stated that Buchanan was going at a walk up S. Union Street on his proper or left-hand side, keeping all the way about four feet from the pavement, and that the runaway horse, when it came in sight, was about the middle of the road; and that Buchanan, seeing this, drew as close as he could to his left-hand pavement, and was just pulling up, when the horse dashed over from the middle of the road, and ran into him; the road from kerbstone to kerbstone was thirty-one feet across. The evidence given for defendant was to the effect that Buchanan's cart was going up originally on its right-hand side of the middle of the street, and that the runaway was coming down, not in the middle, but half-way between the middle of the street and its own right side, and that Buchanan, whether in order to get to his proper side of the street, or for some other reason, drove across to the left-hand side, and so got deliberately into the course the runaway horse was taking. There was also evidence that plaintiff and Buchanan had both said after the accident, "We thought it was Stevens' horse, and tried to turn it back, only for this the accident would not have happened" (Stevens, whose stables were in Pier Street, had a horse which was the same colour as the runaway); but this was denied by them, and the Court was not satisfied with the evidence as to these conversations. After the collision, the runaway veered into the middle of the street, ran past the gate of his stables, and stopped some distance below them. In consequence of the fall from the cart, plaintiff received severe injuries; he was confined to his bed for six weeks, and was still at the date of the trial unfit for work. Three weeks after the accident, he was discovered to have hernia, which would necessitate his wearing a truss continually. He was a butcher with a large business, doing his own buying and selling, and led evidence to show that he had

already paid some £86 15*s.* to his brother, as commission for buying in his place, £25 to a substitute in the shop, and £25 for medical attendance.

Maasdorp, S.-G. (with him *Hutton*), for plaintiff: It is admitted that the horse was left unbridled with harness on in a yard in which were two open gates leading to the streets; the horse was left unattended and with a heavy harness trailing from it, and it was only reasonable to expect that it might take fright from some cause and escape into the street. If a man through himself or his servants does anything which may probably cause damage to others and omits to take reasonable precautions against such damage, he is guilty of negligence. Here the thing causing the accident was solely under the management of the defendant, and the mere occurrence of the accident raises a presumption of negligence on the defendant's part: *Lynch* vs. *Nurdin* (1 Q. B. 59); *Illidge* vs. *Goodwin* (5 C. & P. 192); *Whatman* vs. *Pearson* (L. R. 3, C. P. 422); *Hammack* vs. *White* (11 C. B. 587); *Hamill* vs. *Webster* (1 Bright, 133); *Thompson on Negligence*, pp. 199 and 216; *Wharton*, ss. 112 and 113; *Grot.* III., 38. 12; *Voet* IX., 1. 4. & 5; *V. Leuw.* III., 324, note c (*Kotze's Trans.*); *Scott* vs. *London Dock Co.* (3 H. & C. 596). The evidence as to contributory negligence was quite untrustworthy; the accounts of the conversations as to Stevens' horse were not given before the Magistrate, and are most improbable. As regards damages plaintiff had already expended £136 15*s.* in consequence of the accident and would have a further outlay. Plaintiff had to be recouped for the personal injury and suffering, the actual consequent expenditure and prospective loss of income: *Voet* IX., 2. 8; *Hume* vs. *Divisional Council of Cradock* (1 E. D. C. 117).

Sampson, Q.C. (with him *King*), for defendant: This collision was the result of an accident that was quite unforeseen; one is only bound to take precautions against what may ordinarily happen. In considering what may be the natural as opposed to the unforeseen results of conduct, both the character of the horse and the place it is left in must be taken into account. The known character of an animal, both in Roman and Roman-Dutch law, makes a difference in the degree of care requisite; here it was an old horse and

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known for years to be quiet. Besides, it was left in a private yard, not in the street, and had been accustomed for years to be so left. *Cowell* vs. *Friedman* (5 H. C. 22); *Hammack* vs. *White* (11 C. B., N. S. 588); *Moffatt* vs. *Bateman* (L. R. 3, C. P. 115), and *Mazzoni* vs. *Douglas* (6 Q. B. D. L. R. 151). As to contributory negligence, the proximate cause of the accident was Buchanan's foolishly driving across the road at the time he did: *Wakeman* vs. *Robinson* (1 Bing. 213).

BARRY, J.P.: In this case plaintiff, a butcher of Port Elizabeth, sues defendant, a carrier and owner of horses and wagons at Port Elizabeth, for £1000 damages, and in his declaration states his cause of action to be that while on September 27th last he was driving along South Union Street, Port Elizabeth, in a cart drawn by one horse with due care, defendant by his servants negligently left one of his horses harnessed, but without bridle and blinkers, loose and unattended in his open premises, in consequence of which the horse escaped into the street and rushed into and collided with the cart and threw plaintiff to the ground to his serious and permanent injury.

The defendant in his plea denies all negligence and adds that plaintiff negligently drove the cart to the side of the street on which defendant's horse was coming down, and thereby, and by want of skill in driving, himself brought about and caused the collision.

The facts undisputed are that defendant is the owner of premises in which there is a large yard into which his stables open, and near the stable door there is a water trough. This yard is approached from the street by a large entrance gate, kept open all day, but usually closed at night. At the back of the yard there is a small door or gate leading to a back lane, which passes into a terrace, which terrace is connected with South Union Street first by Pier Street, and then by Walmer Road. Defendant has several wagons, the drivers of which each have charge of the horses, with which they carry goods and which they daily bring to the yard about one o'clock to bait with their harness on, and before taking them into the stables remove the bridle, leaving the horses without any headgear at all to stale and water themselves unattended, while the drivers go into the

stables to prepare the forage, after which the horses enter the stables and there each in his own place is tied up by the halter which is permanently attached to the manger. Defendant states that he knew this to be the practice and approved of it. On September 27th his driver Johnson, acting as usual, brought his two horses to this yard, leading one and followed by the other, the horse that caused the injury. In the yard he took their bridles off, and while he went into the stable to prepare their forage the horses walked to the trough. On coming out of the stable he went up to the horse which had been led and picked up its breeching to give it air, as it was a very hot day. The other horse was then seen to kick about playfully and run about the yard. Johnson tried to stop him, but could not prevent his running to the little back gate and passing through it without harness and without headgear. The horse was next seen by several witnesses coming round the corner of Walmer Road into Union Street, in the direction of the stables. At this time plaintiff was sitting in the cart of a baker named Buchanan, who was driving the cart, in which Buchanan's little son was also sitting. The cart travelled slowly in the direction of Walmer Road and continued to do so till it arrived at the corner of Pier Street where, when Buchanan was on the point of pulling up his horse, whose head was at that time over the pavement on Buchanan's left, at Hartel's shop, defendant's horse rushed at and struck the cart, thereby tossing the occupants into the street. Plaintiff, who fell on his back, was stunned, and had to be carried on a shutter to his home, where he was confined to his bed for more than three weeks, and ultimately betrayed signs of a rupture which now causes him to wear a truss. The defendant has led evidence attempting to prove that when Buchanan first saw the runaway horse, he was driving on the wrong side of the road, and thinking that the horse belonged to a neighbour called Stevens, he made for Hartel's corner, not with the object of getting to his right or near side, but with a view to turning the runaway horse into Pier Street, where Stevens' stables were; that he did this at a time when the runaway horse was galloping near and along the left pavement, and that but for this action on the part of plaintiff and Buchanan, the horse would have passed Buchanan's cart without injuring it. Johnson, the driver,

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also added that, while at first he thought the horse was kicking playfully in the yard, he soon saw that he was kicking viciously, and that, even had he been haltered or bridled with blinkers, he could not possibly have caught him; in his opinion, the horse must have been stung by a bee or some other insect. We cannot, however, regard Johnson's evidence as reliable. When in the case brought by Buchanan against defendant for the injury to his cart, Johnson stated that "there was nothing on the horse's head, so I could not catch him; if he had had anything, I should have got at him." There is, moreover, no evidence to show that the horse was even examined for the purpose of ascertaining if he had been stung. We may therefore fairly come to the conclusion that it was not the sudden development of vice or the sting of a bee that caused the alleged kicking, but that the horse escaped out of the yard because of the absence of any headgear, and without any special provocation. There is no doubt evidence in support of the defendant's contention that Buchanan's cart was on its wrong side when the horse first came in sight. There is, however, strong evidence in contradiction of this. There is also evidence in support of the defendant's other contention that the runaway horse was running near the left pavement from the time it was first seen coming round the corner from Walmer Road. But there is again strong evidence that the horse was not running there, but nearer the opposite side of the road, and it certainly seems more probable that in turning the corner at full gallop, the runaway should have first appeared dashing down South Union Street nearer the right-hand side of this street. Neither contention, however, seems to me of very great importance unless defendant succeeds in proving that Buchanan, in making for his near side, did so with the intention of stopping the horse with his cart. The evidence in support of this contention, is that, first of Johnson, who now for the first time says that about a week after the accident, Buchanan called him to his house and asked him where one "Cock-eye" was, and upon Johnson asking whether the matter was coming into Court, Buchanan replied he didn't know, and turning to a man called Miller who was present, said, "I was going to stop the horse thinking it was Stevens'; when the horse got close I saw it was not, and then it was too late to get out of

the way." Nothing of this kind was said by Johnson before the Magistrate, nor was Miller called to corroborate him, and as there are other circumstances already referred to which throw doubt upon Johnson's credibility, we cannot accept his statement as correct. The most important evidence for defendant upon this point is that of Frank Olivier, who says that he asked Buchanan how the accident happened, when he replied, "Accidents will happen; I thought it was Stevens' horse, and I crossed the street to stop the horse so that it should go to Stevens' stables." This witness, however, seems to follow the same practice as the defendant in leaving his horses unbridled, and is sometimes employed by the latter as a carter, while his imperfect knowledge of English may have caused him to misapprehend what Buchanan was supposed to have said. The other evidence for defendant on this point is his own statement, in which he says that plaintiff told him that he would have avoided the accident if he hadn't thought that it was Stevens' horse; this is different from his statement before the Magistrate, when he said that plaintiff told him that he thought it was Stevens' horse and tried to stop it, and afterwards found it was not. It is quite possible that either Buchanan or plaintiff may have thought it was Stevens' horse and have said so, but both Buchanan and plaintiff deny that they did so, and it is clear from the altered nature of the evidence given before us, that the idea of stopping Stevens' horse by putting the cart across the road as a sort of barricade, is the growth of imagination, and it is almost impossible to conceive that Buchanan, with his child sitting at his side, should have attempted to do so. The onus of proving contributory negligence rests on defendant, and we cannot receive as correct the evidence of his witnesses either as to the position of Buchanan's cart, or the course taken by the runaway horse, or the words alleged to have been uttered about Stevens' horse. The evidence of plaintiff's witnesses is better supported by the probabilities of the case, and it was only natural and proper that Buchanan, having no occasion to be on his wrong side, and travelling at a walking pace, should be on his proper side and seeing the runaway horse should make for the pavement on that side so as to allow him to pass. It is quite clear from the evidence, and indeed undisputed, that when struck,

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Buchanan's cart was on its proper side, whilst the runaway horse was not. That the runaway horse should have swerved from his right side before approaching the cart is not unnatural, judging from the habits of horses under somewhat similar circumstances. The only question therefore for the Court to determine, is whether the undisputed evidence, to which I have referred at the outset, proves that defendant and his servants were negligent in leaving this horse in the yard open to the street and to the back lane harnessed and without headgear. In argument, it was contended for the defendant, that the custom of the stable disproves negligence, and that it was impossible to provide against this sudden outbreak of playfulness or vice. In this I cannot agree; the defendant no doubt had a perfect right to stable his horses harnessed in hot weather, instead of removing the harness and rubbing them down, but if he chose to do so it was his duty to keep the horses under such control that they could not, by escaping into the street harnessed and without headgear, be a danger to the public. This danger might have been averted by closing the gate or having a chain fastening across the openings. The fact that nothing of this kind was ever attempted, and that some twenty horses, harnessed and unbridled, were allowed daily to roam about this open yard, proves beyond doubt negligence, inasmuch as harnessed horses so uncontrolled might at any moment come in contact with each other or with objects in the yard, or in some other way be disturbed, and so being under no control might naturally become a danger to the public. This action is founded upon the negligent keeping of this horse, and finding that this *culpa* did exist, we give judgment for plaintiff. The amount of damages we assess at £200; this judgment will carry costs.

JONES and MAASDORP, JJ., concurred.

[Plaintiff's Attorneys, BELL & HUTTON.
Defendant's Attorney, H. WRIGHT.]

RICHARDSON *vs.* RICHARDSON.

Act 5 *of* 1879, *sect.* 15—*Appeal—Costs.*

Where an application was made for leave to appeal from an order of the Eastern District Court as to costs only, leave was granted, but the majority of the Court based their decision on the ground that there was no opposition to the application.

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Richardson *vs.* Richardson.

This was an application for leave to appeal from an order of the Eastern District Court, in the matter of *Richardson* vs. *Richardson* (reported *supra*, p. 52) an application in which costs had been given against the then respondent, who now applied for leave to appeal. Sect. 15, Act 5 of 1879 provides, "No judgment decree or order made by the Eastern District Court, or any Circuit Court by the consent of parties, or as to costs only, which by law are left to the discretion of the Court, and no interlocutory order shall be subject to any appeal, except by leave of the Court or Judge pronouncing such decree or order."

Blaine, for applicant (after stating the facts of the original application): There are special reasons why an appeal should be allowed in this case. Both on the merits of the case and on a legal point involved, there is room for doubt, and the Court were not unanimous in their judgment. The respondent has received notice of this application, and has not appeared to oppose it.

BARRY, J.P.: Holding the view I did when the matter came before us originally, I do not now wish to express any strong opinion on the present application. I think, however, leave to appeal should be granted.

JONES, J.: It is an advantage that as many opportunities as possible should be given to an unsuccessful party to a suit of appealing, but still, if this application had been opposed, I would probably have been led to the opinion that it should be refused. As it is, I consider that leave should be given.

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MAASDORP, J.: I concur; but if any opposition had been offered on the part of respondent, I would have refused leave.

[Applicant's Attorneys, STONE & SON.]

Q. *vs.* FRIEDRICH.

Sect. 6, *Act* 13 *of* 1870—*Act* 38 *of* 1887—*Licence—Dealer in Gunpowder—Fireworks.*

Fireworks, as explosives, are included in the term gunpowder, and any one selling them without having a licence as a dealer in gunpowder, is guilty of contravening sect. 6, *Act* 13 *of* 1870.

1895. Dec. 12. Queen *vs.* Friedrich.

This was a review of a decision of the acting Resident Magistrate of King Williamstown.

Ludwich Friedrich was accused of contravening sect. 6, Act 13 of 1870, as amended by Act 20 of 1884, and Act 38 of 1887, in that on the 29th of October, at King Williamstown, he exercised the trade of a dealer in gunpowder, by selling to one Charles Collocott, a quantity of an explosive substance, commonly called fireworks, without having taken out the licence required by law.

Accused admitted having sold fireworks on the occasion alleged, and the only question at issue was whether fireworks came under the term gunpowder, so as to make his action a contravention of the Act. The Schedule to Act 20 of 1884 makes a licence, with a stamp duty of £5, necessary for any one dealing in gunpowder, and sect. 2, Act 38 of 1887 defines dealer in gunpowder as "any person who sells gunpowder explosives and explosive substances." Accused was found guilty, and sentenced to pay a fine of £5 1*s.*

Hutton (at the request of the Court) for accused: The intention of the Act can hardly have been to impose a a licence on the sale of fireworks, such as catherine-wheels and crackers; but it must be admitted, that literally they come within the term explosives. That this is so, is made clear from sect. 2, Act 4 of 1887 (relating to the manufacture, etc., of explosive substances), taken from 38 & 39

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Vict. c. 17, where explosive, for the purposes of the Act, includes "every substance used or manufactured with a view to produce a practical effect by explosion or a pyrotechnic effect."

Maasdorp, S.-G., for the Crown: The question of the liability of dealers in fireworks, generally arises each year, about November 5th. There is no doubt that they come within the words of the Act, though there may be some as to whether the legislature intended them to.

BARRY, J.P.: I think it is clear, the Magistrate's judgment and sentence must be confirmed. Fireworks are included in the term explosives, and so dealing in them is a contravention of the Act.

JONES, J.: I concur; I think fireworks must be held to be included under the class of explosives. At the same time, it seems doubtful whether the legislature really intended this, and it is a regrettable thing that many shopkeepers should deal in fireworks, without the least knowledge that they are contravening this Act, and consequently are through ignorance making themselves liable to its penalty.

MAASDORP, J., concurred.

FUTCHANI *vs.* KRETCHMAN.

Use and occupation—Trespass—Ejectment—Damages.

Where plaintiff was in occupation of defendant's huts under no agreement of lease and had received notice to quit and refused to do so, and defendant consequently removed plaintiff's furniture from the huts and set fire to the huts without injuring any of plaintiff's property, Held, *that plaintiff could not recover damages for trespass or wrongful ejectment.*

1895. Dec. 14.

Futchani *vs.* Kretchman.

This was an appeal from a decision of the Resident Magistrate of East London.

The appellant, Mativa Futchani (plaintiff in the Court below) sued William Kretchman, respondent, to recover

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£20 damages for trespass and breach of contract; in that on or about July 1st, 1895, plaintiff hired verbally from defendant a portion of defendant's farm with two huts upon it, with the right of living in the huts, cultivating the land leased, and enjoying certain rights of pasture over defendant's farm; the hiring was for one year at a rental of £6 per annum; but at divers times before the 7th October, 1895, defendant trespassed on the said lands and harassed and annoyed plaintiff and ordered him to quit the lands and huts, and on the 7th of October, defendant set fire to and burnt down the said huts and destroyed and lost certain money of the plaintiff's and drove him from the lands and made him homeless. Defendant pleaded the general issue, and claimed in re-convention £1 10*s.* for a hut destroyed by plaintiff.

Before the Magistrate plaintiff gave evidence that about the 1st of July he went to defendant, accompanied by one Ngogo, and made a verbal agreement to hire from defendant certain plough lands with two huts on them and grazing for his seven head of cattle at a rent of £6 a year. A few days later the lands and huts were pointed out to him by defendant's son, and he settled there with his two wives and seven children. He brought ten goats also, to which defendant at first objected on account of the necessity of dipping them, but ultimately he was allowed to retain them. About the end of August defendant wished to hire plaintiff's son as a labourer, but plaintiff refused as the son was in employment at East London, and defendant then began to annoy him by impounding his stock (a letter of the 27th August was put in written by an attorney to defendant claiming four shillings, as a refund of pound fees paid by plaintiff on stock wrongfully impounded by defendant). Defendant kept on trying to drive plaintiff from the place, and on 3rd of October another attorney's letter was written on behalf of plaintiff claiming £1 5*s.* pound fees and £10 damages for trespass. On October 7th, defendant told plaintiff to leave the lands, and on the same day the two huts were burnt down in plaintiff's absence. When they were burnt, £3 10*s.* belonging to plaintiff was hidden in the thatch, and this money had never been recovered. Ngogo gave corroborative evidence about the making of the agreement, and Notese, plaintiff's wife, stated she was present when defendant set

fire to the huts, having first told her to move out her things. She moved out the furniture and told defendant there was money hidden in the hut, but she did not know where.

For the defence, defendant, a field-cornet living near East London, stated that defendant came to him at the end of June and wanted to hire lands. Defendant told him that he might live on the land, on condition of providing one monthly servant, and that if he got any land to plough he was to pay a rent of £6 a year for it. Plaintiff shortly after came and settled on the farm, but defendant never assigned him any land or huts, and also told him he was not to bring any goats on the place. For one week plaintiff sent his son as a labourer, but failing to fulfil this condition any further he was ordered to leave. On August 14th he came to defendant and tried to make a new agreement, leaving out the stipulation about labour and offering to pay £12 per annum. Defendant refused to accede to this, and told plaintiff to leave by August 21st; when he did not do so defendant removed the thatch from the huts occupied by plaintiff, and on its being replaced set fire to the huts on October 7th. He told plaintiff's wife to remove her goods, and knew nothing of any money being there. Defendant's son, Frederick Kretchman, who had acted as interpreter at these interviews, gave evidence to the same effect, but admitted that at the burning of the hut Notese might have said something about money being there.

Judgment was given for defendant in convention and for plaintiff in defendant's claim in re-convention, and from this judgment plaintiff now appealed.

The Magistrate in his reasons, said, "Plaintiff relies on a contract for the occupation of these huts and lands, but it is clear that no such contract was made with the defendant personally, and that plaintiff by bringing goats on the farm violated the conditions on which he was allowed to stay there. Besides, on August 14th, he proposed fresh terms to defendant and these were refused, and any licence he had to remain on the premises was withdrawn."

Hutton, for appellant: Defendant's own evidence shows that plaintiff was in occupation by an agreement, and that in terms of this agreement he furnished a labourer for one week; if he afterwards violated the conditions of the agree-

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ment, defendant had no right to eject him summarily but only after obtaining an order of Court. Even if plaintiff was a trespasser, defendant had no right to burn the huts in such a way as to destroy his property.

[*Per* JONES, J.: That question was discussed in *London & South African Exploration Co.* vs. *Moodoosoodam* (3 H. C. 305.)

BARRY, J.P.: In the case of *Gaudini* vs. *Schoombe* (June, 1865, not reported), Mr. Justice Connor held that it was lawful to remove the doors and windows of your house in order to procure the removal of a tenant whose lease had expired but who refused to quit. There, too, the tenant sought to recover damages for watches and other property destroyed owing to the landlord's conduct, but he failed to convince the Court of the existence of this property.]

The evidence here as to the £3 10*s.* is not denied, and plaintiff's son admits that Notese warned him there was money in the hut. Plaintiff is entitled to this £3 10*s.*, to £1 5*s.* pound fees and compensation; in a case of this sort the Court will not scrutinise the evidence of damage closely. *Stuurman* vs. *Van Roogen* (10 J. 35); *Johnson* vs. *Pienaar* (1 Jut. 276).

Maasdorp, S.-G., for respondent: Plaintiff had merely a licence to live on the farm, and this was withdrawn. Defendant had then a right to destroy his own property if he thought fit. He had not the power to do so in such a way as to destroy plaintiff's goods, and if the £3 10*s.* was really there, plaintiff might have a claim for this amount, but the Magistrate evidently did not believe in its existence.

Per Curiam. The case will be postponed and the Magistrate asked for his finding as to whether there was any money lost owing to the burning of the huts, and if so, how much.

Posteà (Jan. 13).

BARRY, J.P.: This is an appeal from the decision of the Resident Magistrate of East London before whom the appellant, a Kaffir, sued respondent for £20 as compensation in damages for trespass, breach of contract and otherwise, appellant alleging that on 1st July, 1895, he verbally hired from defendant part of his farm, No. 109, near Potsdam, with two huts thereon to live in, and the right to cultivate

certain arable lands, and to depasture his cattle on portion of the farm for a year at a rental of £6, and that before the 7th October respondent trespassed on this land and ordered appellant to quit the land and huts; that on the 7th October respondent in appellant's absence set fire to and burnt down the two huts, destroying certain money of appellant's in those huts, and rendering him homeless. The evidence for the appellant, given by himself, was that some time ago respondent pointed out to him some ground, and gave him the right to plough it, to graze cattle, and to live in certain huts, which he thereafter occupied with his two wives, seven children and some grandchildren. That he did not plough, because it was winter and too dry, but that after some time respondent asked him for the use of one of his children as a servant, which he refused on the ground that he had not agreed to supply a servant, and that thereupon respondent told him to leave the farm. Appellant thereupon went to consult his agent at East London, who wrote to respondent on the 27th August, complaining that he had wrongfully impounded appellant's cattle, and demanded damages. This he did again in October, and subsequently the huts were burnt by respondent, there being £3 10*s.* hidden in one of the huts. The appellant's statement with regard to this money was not corroborated. The evidence for the defence was that on the 26th May last, appellant came to respondent, and in presence of respondent's son, who interpreted, asked to hire some land, which respondent refused to hire to him except upon the condition that he and his family worked for him, and that he would not allow any goats to come there; that there was no mention of huts, nor were any huts or land pointed out to the appellant, who left after this interview, and subsequently in respondent's absence came to the farm and took possession of two huts, where respondent found him on the 5th of July, when he said, "As you are here, I want the services of your son." Appellant offered him the services of a younger lad who soon left, and then appellant told him he would not supply him with any labour. After this, on August 14th, appellant came to respondent and offered to give him £12 a year if he would allow him to occupy the place without the condition to supply labour. This respondent refused to do, and then it was agreed that appellant should be allowed to stay on the

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place till August 21st, when he was to move off. Notwithstanding this, he did not on that date remove his furniture, which respondent then caused to be moved out of the hut, and some of appellant's goats were also impounded. Respondent's son corroborated his father's statement, and added that he was present when the huts were burnt in appellant's absence after everything was moved out of them, and that appellant's wives, who were also present, said nothing about any property being in the hut. The Magistrate finds that there was no money in the hut, and believes respondent's statement. We cannot come to the conclusion that the Magistrate was wrong, seeing that appellant was the only person who seems to have had any knowledge of this money. Unless there was money in the thatch at the time of the burning, there can be no case for appellant, inasmuch as the appellant's occupation was under no agreement of lease, and when the huts were burnt, no wrong or injury was committed. The only property injured was that of respondent himself, who, in trying to get possession of his own property, is not proved to have done any injury to property of appellant's, nor were any rights of appellant disturbed by him. The appeal must be dismissed with costs.

JONES and MAASDORP, JJ., concurred.

[Appellant's Attorneys, BELL & HUTTON.
Respondent's Attorneys, STONE & SON.]

BARTLETT *vs.* WILLIMORE.

Summons—Joinder of defendants—Injury by dog.

Where a summons in the Magistrate's Court set forth that six dogs, the property of defendant and others, had trespassed on plaintiff's farm and killed five ostriches valued at £65, *and the summons claimed from defendant* £20 *damages, and the defendant excepted to it as bad in law, owing to its vagueness and the non-joinder of the other owners of the dogs as defendants,* Held, *that this exception ought not to be sustained.*

1896. Jan. 13.
Bartlett vs. Willimore.

This was an appeal from a decision of the R. M. of Cathcart, in a claim for £20 damages for injuries done by defendant's dog to plaintiff's ostriches.

The summons set forth that William J. Bartlett, the plaintiff, was part owner, and in lawful possession of the farm Thornmeadow; that on October 27th, 1895, six dogs, the property of Willimore (the defendant), and of one Umyali, and the sons of Umyali, trespassed, and came on the said farm and killed five ostriches belonging to plaintiff, whereby plaintiff suffered damages to the extent of £65; that Umyali had agreed to pay plaintiff one half this amount, and that to bring his claim against defendant within the Magistrate's jurisdiction, he reduced it to £20, which sum he now claimed as damages from him. To this summons, defendant excepted as being bad in law by reason of its vagueness, and the non-joinder of Umyali and his sons as defendants.

The Magistrate sustained this exception, and from this decision plaintiff now appealed.

Sampson, Q.C., for appellant: The summons states that defendant was the owner of at least one of the dogs who caused the damage, and where damage is done by several dogs, the owner of each of them is primarily liable for the full damage done, unless the evidence can separate the damage due to each dog. Consequently, evidence ought to have been taken here to ascertain defendant's liability: *Graan* vs. *During* (2 J. 308); *Nel* vs. *Halse* (6 J. 275).

There was no appearance for respondent.

Per Curiam. The Magistrate was clearly wrong in allowing this exception. The exception will be overruled, and the case sent back for decision on the merits, respondent to pay costs here, and of the day in the Court below.

[Appellant's Attorneys, BELL & HUTTON.]

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BOSCH *vs.* VAN DER HEEVER.

Magistrate's Court – Jurisdiction – Counterclaim.

Where in the Magistrate's Court defendant set up a counterclaim alleging that in a certain transaction he had given plaintiff a promissory note for £44 as security for whatever debt might be due to plaintiff, and that as only £8 14s. had proved to be due, £35 6s. was now due and payable to him by plaintiff, and took exception that owing to the amount of this counterclaim the Magistrate's jurisdiction was ousted, but the Magistrate, after hearing evidence, decided that the promissory note was given, not as security, but as a final settlement, and consequently dismissed the exception, Held, *that there was a* bonâ fide *counterclaim set up in excess of the Magistrate's jurisdiction, and that the exception must be allowed.*

1896. Jan. 12.

Bosch *vs.* Van der Heever.

Appeal from a decision of the Resident Magistrate of Albert.

J. H. van der Heever, the respondent, had sued J. Bosch, the appellant, in the Magistrate's Court at Albert, for the sum of £11 3*s.* 3*d.* with interest *a tempore morae,* due to him for legal services rendered, money advanced, etc.

The appellant (defendant in the Court below) alleged that

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he had a *bonâ fide* counterclaim against the plaintiff for the sum of £44, less two items of £4 7*s.* each, and as this sum of £35 6*s.* was in excess of the Magistrate's jurisdiction, he excepted to the Court's jurisdiction to try the case.

It appeared from the evidence taken before the Magistrate in support of the exception that defendant's son had employed the plaintiff as his agent for certain legal work, and had received from him a bill of costs for £44, and that defendant made himself liable for this bill of costs and gave plaintiff a promissory note for £44, but, as defendant alleged, only as security for the payment, it being arranged between them that defendant should only pay such portions of the bill as were properly due by his son; he now contended that only two items of £4 7*s.* each were properly due, and claimed a refund of the balance, £35 6*s.*; this was the counterclaim alleged. Plaintiff denied that there was any such arrangement, and said the promissory note was given him in final settlement of the son's debt. The bill of costs for £44 was annexed, and contained items which would most probably be reduced on taxation.

The Magistrate, after hearing the evidence of both plaintiff and defendant, overruled the exception, and gave judgment for the plaintiff for the full amount claimed. In his reasons he stated: I had to determine whether defendant had a *bonâ fide* counterclaim, or whether a settlement in the subject-matter of his claim had been arrived at. I concluded that when Bosch signed the promissory note he did so as a final settlement of the debt claimed. The amount of plaintiff's claim, £11 3*s.* 3*d.*, was not disputed or questioned.

From this decision defendant now appealed.

Maasdorp, S.-G., for appellant: It is clear the Magistrate had no jurisdiction. As is stated in *Bertram* vs. *Wood* (10 Juta, 177), "the general principle is well established that a Magistrate has no jurisdiction to try a claim to which a *bonâ fide* defence is taken, having the effect, if valid, of extinguishing the claim and involving questions beyond his jurisdiction." Here he went into the merits, and decided on the counterclaim as if it was properly before him for trial: *Brady* vs. *Michiel* (3 Juta, 178); *De Jager* vs. *De Jager* (3 Juta, 69).

Sampson, Q.C., for respondent: The Magistrate had to determine whether there was a *bonâ fide* counterclaim; that is not whether the defendant believed he had a claim, but whether a claim existed enforceable by action. To do so he took evidence, and found that the claim purported to be for the return of money paid under protest, or subject to an agreement, but finding as a fact that there was no protest or agreement, he rightly came to the conclusion that the counterclaim was not *bonâ fide*. It is the nature of the claim, not the defendant's belief in it, which renders it *bonâ fide* or otherwise: *Myburgh and Others* vs. *Cloete* (3 Men. 564); *Westfall* vs. *Bartlett* (1 E. D. C. 72); *De Kock* vs. *Du Toit* (3. S. 228).

BARRY, J.P.: This appeal must be allowed. The ground of appeal is that the Magistrate's jurisdiction was ousted, as defendant had a *bonâ fide* counterclaim of an amount in excess of the Magistrate's jurisdiction. I think that he had such a counterclaim, and, what is more, that plaintiff had notice that he had. I cannot quite follow the Magistrate's reasoning, as he leaves untouched the real question that he had to decide, viz., whether defendant had a *bonâ fide* counterclaim. If he had come to the conclusion that this counterclaim was not *bonâ fide*, but a mere pretence put up to shield defendant, there might have been some difficulty about the case, as we would have been obliged to consider how far he was justified in coming to that conclusion, but as it is, he has come to no conclusion on that point, but has left it to us to determine whether there was a *bonâ fide* counterclaim put forward, and we have no difficulty in saying that there was.

JONES, J., concurred.

[Appellant's Attorneys, BELL & HUTTON.
Respondent's Attorneys, WRIGHT & STAPYLTON-SMITH.]

QUEEN *vs.* WENTWORTH.

Sect. 14, *Act* 18 *of* 1873—*Masters and Servants Act—Special Justice of the Peace—Jurisdiction—Sect.* 1, *Act* 30 *of* 1889.

Where accused was found guilty of contravening sect. 14 *of the Masters and Servants Act by withholding the wages of his servant, and the evidence showed that what was due to the servant (if anything) was not wages, but compensation for wrongful dismissal,* Held, *that withholding such compensation is not an offence under sect.* 14 *of the Act, and that consequently the judgment of guilty was wrong.*

Although by Act 30 *of* 1889, *sect.* 1, *special Justices of the Peace have jurisdiction to try offences under the Masters and Servants Act, they have no power to try cases of breach of contract between Masters and Servants when such cases do not constitute an offence.*

1896. Feb. 18. — Queen vs. Wentworth.

Review of a decision of the Special Justice of the Peace of Hope Town.

Frederick Wentworth was charged with contravening sect. 14, Act 18 of 1873, in that on or about the 4th day of February, 1896, in the district of Hope Town, he had been wrongfully and unlawfully withholding the wages of Piet Saunders, his servant, without reasonable and probable cause for believing that the wages withheld were not really due.

It was admitted that Piet Saunders was a monthly servant of the accused, receiving as wages twelve shillings a month with food and clothing, and that on January 29 he gave notice that he would leave accused's service on February 28; he was paid his wages up to the end of January, and also received one shilling on account of his wages for February. He quitted accused's service on February 4th, and there was a conflict of evidence as to the circumstances under which he did so. Saunders, the complainant, stated that accused discharged him on that day, alleging as a reason that the horses were left without forage, which was not the case; accused stated that he did not dismiss him, but that he remonstrated with him on the 4th for leaving the horses without forage, and accused him of being drunk and incapable of doing his work, and told him not to go near the

horses, whereupon complainant said, "Then I will go, and not stop; you must pay my month's wages." This accused refused to do. This statement was corroborated by another witness.

The Magistrate found the accused guilty, and the sentence was as follows: "Accused to take back complainant into employ to 28th February, 1896, or, if unwilling so to do, to pay wages up to that date at the rate of twelve shillings per month, less one shilling already paid on account; or, if both parties are agreeable, to cancel the contract of service, the wages to be paid proportionally, *i.e.*, sixpence per day from 29th January to 4th February, both dates inclusive.

BARRY, J.P.: In this case, which came before me for review as Judge of the week, the accused was found guilty, and should therefore have been sentenced to pay a fine if the conviction was right. It is, however, questionable whether the conviction was right; indeed it is clear to me that it was wrong. There is no proof that Saunders was dismissed, and if not dismissed, nothing was due to Saunders. But even if the proof of dismissal was satisfactory, what was withheld after February 4th was not wages, but compensation for wrongful dismissal, and non-payment of such compensation is not an offence under sect. 14, so that whether Saunders was dismissed or not, the verdict of guilty is wrong, and must be quashed. The so-called sentence, or what must be regarded as a civil judgment or order, is a matter not within the S.J.P.'s jurisdiction. By Act 30 of 1889, Special Justices of the Peace have jurisdiction "over and in respect of any person with regard to any offence against the provisions of the Masters and Servants Act," but apparently only in regard to offences, and therefore not in regard to breaches of contract between masters and servants, which are not offences. There being no offence proved, the verdict must be altered to one of not guilty, and irrespective of what may be the rights of the parties, the so-called sentence must be set aside, as an order beyond the S.J.P.'s jurisdiction.

Du Toit *vs.* Fitzgerald.

Act 8 of 1879, sect. 6—Civil Imprisonment—Proof of Means.

A decree of civil imprisonment granted against a defendant who stated that he had neither means nor employment, and was, with his wife and five children, supported by his mother, there being evidence that a promissory note for £80 made in his favour would soon become payable, and that he had said he was possessed of seven hundred sheep.

1896. Feb. 18.

Du Toit *vs.* Fitzgerald.

This was an application for a decree of civil imprisonment against John Thomas Fitzgerald at the instance of the plaintiff, Jacob Johannes Du Toit. Defendant was indebted to plaintiff in the sum of £9 18*s.* 10*d.* by virtue of a sentence of the Court in November, 1895, together with £27 costs, and a writ of execution had been taken out for these sums, and a return of *nulla bona* made on it.

Affidavits were filed resisting the application, one by defendant who stated that till May, 1895, he was a hotel proprietor at Lady Grey; that he became liable for £300 or thereabouts as the result of unsuccessful litigation, and was obliged to relinquish his business, there being then about £400 due to him, but the greater part of this had proved to be unrealizable; that at present he, with his wife and five children, was living with his stepmother, and that he had been lately sued by Mosenthal & Co. for £140, and a return of *nulla bona* had been made to the writ issued in that matter; that he was without employment and that it would militate against his chances of obtaining employment if this decree were to issue. There was a further affidavit from Robert Attwell, an attorney at Lady Grey, stating that defendant's accounts were handed over to him to collect, that the greater part of them were for liquor supplied at his bar and so could not be sued for, that all that could be collected had been applied to pay defendant's debts, and that defendant was utterly unable to meet the present demand or any part of it.

In support of the application an affidavit of plaintiff stated that he had acted as agent for one Printzkow, who had bought defendant's hotel at Lady Grey, that at the time of sale defendant stated he had been doing well and produced

his books, shewing £700 as outstanding debts, and that the purchase price paid to defendant was £320 in four promissory notes at three, six, nine, and twelve months date respectively, the last of which would not fall due till May 1st next; that defendant had stated to many people that he had seven hundred sheep on his mother's farm, that he was a strong able-bodied man, and was managing his mother's farm, out of which he reaped a profit, and was able to keep his son at Dale College. There was also a long affidavit from M. L. Sear, an attorney, giving the history of the various steps in the litigation between plaintiff and defendant, and purporting to shew that defendant, by unnecessarily opposing applications and entering appeals and failing to prosecute them, had vexatiously increased costs and delayed the plaintiff in obtaining legal remedy.

Sampson, Q.C., for defendant: The only question is, has defendant means from which he could satisfy this claim? It is clear that he is without means and is living on charity; a decree will not be granted where its only defect would be to cripple defendant's future prospects. *Field & Co.* vs. *Wernikoff*, 12 Sup. Court, 15.

Blaine, for plaintiff: That defendant has some means is proved by the fact of the promissory note which will fall due, as well as his statement about the sheep. Besides, it is only reasonable to suppose that he receives something for managing his mother's farm. Sear's affidavit shews that defendant's conduct has been such as to entitle him to no leniency.

BARRY, J.P.: I consider that defendant has not satisfied us that he is without means. He has received various sums as the price of his hotel business, and one promissory note has still to fall due; besides, there is the statement not contradicted of his having said that he owns seven hundred sheep, and a further statement that he is in his mother's employment. It has been argued that Sear's affidavit is irrelevant as merely shewing that defendant is spiteful and has purposely denuded himself of his property; if, however, the Court were satisfied that he is spiteful and had vexatiously protracted this litigation, this would go far in making us consider his affidavit unsatisfactory, and in

1896. Feb. 18. — Du Toit vs. Fitzgerald.

bringing us to the conclusion that he is ready to help his case now by reckless assertions. I think he has tried to strengthen his resistance to this application by stating what is not correct, and am of opinion that the decree of civil imprisonment should be allowed with costs.

JONES, J., concurred.

[Plaintiff's Attorneys, BELL & HUTTON.
Defendant's Attorneys, STONE & SON.]

QUEEN *vs.* MDANI AND OTHERS.

Act 27 of 1882, sect. 8—Police Offences—Obstructing Police —Noting of Appeal—Practice.

Where within four days of the hearing of a case in the Magistrate's Court, notice of appeal was duly given and subsequently the agent, under a misapprehension, withdrew this notice, and after the four days had elapsed wrote asking the Magistrate to cancel this withdrawal, Held, *that the appeal might be proceeded with on these facts being proved by affidavit.*

Where prisoners were charged with hindering or disturbing the police in the execution of their duty, and the evidence shewed that they had met two policemen in uniform on the road and had assaulted and driven them away, but did not shew that they knew on what particular duty the police were engaged, or that they were informed or had any direct knowledge that they were on duty at all, Held, *that a knowledge that the police were on duty could be inferred from all the circumstances and that the Magistrate was justified in convicting.*

1896. Feb. 18. — Queen vs. Mdani and Others.

This was an appeal from a decision of the Resident Magistrate of Herschell.

Sampson, Q.C., for appellants, stated that the case was heard before the Resident Magistrate of Herschell, on the 7th and 9th of January; within four days after the trial notice of appeal was given, but the agent who appeared for the prisoners afterwards wrote to the Magistrate withdrawing this notice; on receiving further instructions from the

prisoners he again wrote (after the four days had elapsed) asking leave to prosecute the appeal notwithstanding this withdrawal; both these letters were attached to the record; the forty-one days within which the appeal had to be prosecuted had not yet expired; under these circumstances he asked leave to go on with the appeal, and referred to *Queen* vs. *Hermann*, 1 Ap. Ca., 316.

Maasdorp, S.-G., for the crown, did not oppose the application, but pointed out that the facts on which it was based ought to be before the Court on affidavit.

Sampson, Q.C., undertook to have the necessary affidavits lodged.

The COURT gave leave to proceed with the appeal, subject to the furnishing of these affidavits.

Before the Magistrate, Mdani and five other native labourers were charged with contravening sect. 8, sub-sect. 5, Act 27 of 1882, in that on or about the 23rd of December, 1895, and in the district of Herschell, they wrongfully and unlawfully resisted and hindered two Cape policemen named Boots and John Futeli, in the discharge of their duty.

Boots gave evidence that on December 23, he and John Futeli were out on horseback looking for stolen cattle; while proceeding along a road through some lands, they saw all six prisoners working on the lands. They dismounted, and Boots asked prisoners to shew him the road to the mountain. Mdani came up and said, "Go away, I don't want police here," and struck Futeli. The other five then came up armed with hoes, and threatened him and Futeli, calling out, "Beat! Beat!" He then drew his revolver and the prisoners retired, and he and Futeli went back. They were dressed in partial uniform at the time. Futeli corroborated this evidence. For the defence evidence was given that the police were informed by Mdani that there was no footpath there, but nevertheless proceeded across the lands to where some women were at work, and then the alleged assault took place.

Sampson, Q.C., for appellants: The facts might amount to an assault, but as there is no evidence that prisoners knew the police were on duty a conviction under this section cannot be sustained; further, it is not shewn that the policemen's duty necessarily took them across these lands,

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they were merely taking a short cut. To justify a conviction it must be shewn that the prisoners' action actually resulted in hindering the execution of the duty the police were engaged in, and that prisoners committed the acts complained of knowingly and wilfully. *Q. vs. Foye and Carlin*, 2 Ap. Ca., 121.

Maasdorp, S.-G., for crown: The evidence shews that the police were stopped, not as being trespassers, but simply because they were police.

BARRY, J.P.: I take it that in this case *Mr. Sampson's* contention is two-fold, firstly, that the police were trespassers and that consequently the owners of the land were justified in ejecting them; secondly, that, even if they were not trespassers, they were not known by the prisoners to be on duty, and therefore the prisoners cannot be charged with having knowingly hindered them in the exercise of their duty. The first point has been urged here, but no stress seems to have been laid on it in the Court below, when the prisoners did not rest their defence on the plea that they were within their rights in removing trespassers. Nor does the evidence bear out this contention; it shews that they were on a road passing by these lands and asked their way up to the mountain, whereupon this attack was made on them; the evidence is that they were on a road, and, in the absence of any further evidence, we cannot assume that they were on private property. As to the other point raised that they did not know the police were on duty, we must look to all the circumstances of the case. These men were police, as was plain from their costume and weapons, and were evidently patrolling; from the question that they asked anyone would have known that they were patrolling on duty. Besides, the evidence shews that the prisoners assaulted these men as policemen; they made an attack upon them simply because they were police or officers of the law, and we consider the Magistrate was right in his inference that by doing so they were guilty of the offence under the statute. The appeal will be dismissed, and the judgment and sentence confirmed.

JONES, J., concurred.

[Appellants' Attorneys, BELL & HUTTON.]

Re MOORCROFT.

Curator bonis.

A curator bonis appointed to a person, who, through age and physical infirmity, was incapable of managing his own affairs, there being no allegation of mental infirmity.

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Re Moorcroft.

This was an application to make absolute a rule *nisi* calling on the respondent Alfred Moorcroft, and his *curator ad litem* F. H. Jones, to shew cause why a *curator bonis* should not be appointed to his property.

The rule *nisi* was granted on the petition of Charlotte Moorcroft and others, and the affidavits attached to this shewed that Alfred Moorcroft was seventy-six years old and in declining health, that he had lost the use of his lower limbs through a spinal complaint and was deaf and incapable of managing his affairs.

An affidavit was now read (by leave of the Court) made by the *curator ad litem* F. H. Jones, stating that on being summoned to shew cause he had visited Alfred Moorcroft at his residence, Moorfield Farm, and had found him to be physically incapable of managing his affairs; that he had himself expressed a wish that one N. Goldsmidt should undertake the management of his property, and deponent believed that it would be for the benefit of his estate that this should be done.

Maasdorp, S.-G. A *curator bonis* can be appointed not merely to those who are insane, prodigals, etc., but also to those who, merely from physical incapacity, are incapable of managing their affairs. Voet, 27. 10. 13. Here it is for the benefit of the estate that this order should be made.

The COURT appointed N. Goldsmidt as *curator bonis*, ordering that he should find security to the satisfaction of the Master, and file an account on August 15th and thereafter every six months.

[Applicant's Attorneys, BELL & HUTTON.]

QUEEN *vs.* LOOTS.

Sects. 9 *&* 10, *Act* 20 *of* 1894—*Scab Act—Assistant Inspector.*

Sect. 9 *of the Scab Act, which makes it an offence to refuse to allow any inspector to enter upon any land to examine sheep or to hinder any such inspector from examining such sheep, does not apply to assistant inspectors, and it is only when accompanying an inspector or in the absence from any field-cornetcy of the inspector, that an assistant, thereto authorized by the chief inspector, has the right of entering upon premises conferred upon such inspector.*

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Review of a decision of the Resident Magistrate of Britstown.

Accused was charged with the crime of contravening sections 9 and 10 of Act No. 20 of 1894, in that upon or about the 26th day of November 1895, and 21st January and 4th February 1896, and at or near Roiidam in the district of Britstown, he did wrongfully and unlawfully refuse to allow one Zacharias B. Grove, Inspector of sheep for Field-Cornetcy No. 1 Britstown, in the district of Britstown, to examine his sheep and obstruct him in the execution of his duty under this Act; 2nd. In that upon the 21st day of January 1896 and at Roiidam aforesaid he did wrongfully and unlawfully refuse to allow William John Fuller, Assistant Scab Inspector of Sheep for the district of Britstown (acting under the authority of the Chief Inspector of Sheep) and Zacharias B. Grove, Inspector of Sheep aforesaid, to examine his sheep and hinder them from examining such sheep and obstruct them in the execution of their duties under this Act; 3rd. In that upon the 4th day of February 1896 and at Roiidam aforesaid he did wrongfully and unlawfully refuse to allow William John Fuller, Assistant Inspector of Sheep for the district of Britstown (acting under the authority of the Chief Inspector of Sheep) to examine his sheep and hinder them (*sic*) from examining such sheep and obstruct them in the execution of their duties under this Act.

Sects. 9 and 10 of the Act are as follows:

"Sect. 9. No person shall refuse to allow any inspector to enter upon any land, pasturage or premises, or to examine any sheep, or shall attempt to impede or hinder any such inspector from examining such

sheep or premises, or shall obstruct him in the execution of his duties under this Act; and every person shall, when requested by any such inspector in accordance with regulations made by the Government, render him every reasonable assistance in the execution of such duties.

"Sect. 10. It shall be lawful for the chief inspector to enter upon any land or premises in this colony for the purpose of supervising or directing the discharge of the duties of the inspector of the field cornetcy or native location in which such land or premises are situated; such chief inspector shall, for the purposes of this Act, be vested with all the powers in any field-cornetcy or location of any inspector of such field-cornetcy or location; provided that the assistants to the chief inspector, when they act under authority of such officer, shall have the right of supervising and directing the carrying out of the duties of the inspectors of such field-cornetcies and accompanying them in the discharge of such duties: and provided, further, that in the absence from any field-cornetcy of the inspector, any assistant when thereto authorized by the chief inspector shall have the rights of entering upon premises conferred upon such inspector."

Sec. 55 provides:

". . . Any person who shall contravene any of the provisions of this Act shall upon conviction be liable to a penalty not exceeding the sum of £20; and every Court of Resident Magistrate shall have jurisdiction under this Act within the limits of its jurisdiction."

For the prosecution Zacharias B. Grove gave evidence: "I am the Scab Inspector for ward No. 1 Britstown. On the 26th of November last I visited the farm Roiidam for the purpose of inspecting the sheep. On my arrival there I asked Johannes Loots, the accused, to allow me to see his sheep; he replied, 'I will not allow my sheep to be inspected.' I then had to leave the farm without seeing his sheep. Accused said he had no occasion to be inspected as he was master of his own farm. On the 21st January last I again visited the farm with the Assistant Inspector, Mr. Fuller, and accused again refused to allow his sheep to be inspected. I was present when Mr. Fuller asked to see the sheep; he replied, 'I am my own master and will not allow you to see the sheep;' we had to leave the farm without seeing the sheep. On the 21st of January I saw sheep, but could not say whose sheep they were; they were being shorn, and accused was one of the shearers. I dare not inspect anyone's sheep unless the owner allowes me. I was not prevented by force from seeing the sheep. Accused gave me no assistance whatever to see his sheep; he did not threaten me, but said he would not allow me to see them."

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William John Fuller stated: "I am assistant inspector for the division of Britstown. On the 21st January last (in accordance with instructions from the Chief Inspector) I proceeded to the farm Rolidam in company with Grove. I met the accused there with some others who were busy shearing. I then asked accused to allow me to inspect his sheep; he replied, 'I will not allow you to inspect them. Accused refused again and I had to leave without seeing them.' On the 4th of February (again under instructions from the Chief Inspector) I visited the farm with Mr. Bayley; we met the accused at his house; he again refused to allow his sheep to be inspected. On that date I explained the whole Act to him, but he still refused. Accused used no force or violence against me, and there was nothing to prevent me inspecting the sheep if I had known where they were; unless the accused had pointed out his sheep to me I certainly could not say which sheep were his; he refused to give me any assistance."

Francis C. Bayley, Scab Inspector for ward No. 6 Britstown, gave corroborating evidence.

No witnesses were called for the defence, but the Magistrate was asked to dismiss the case on the ground that it was not proved that accused was possessed of any sheep. Accused was found guilty and sentenced to a fine of £10.

This judgment now was brought before the Court for argument on review. The ground of review was stated to be "*inter alia* that the charge has not been sufficiently proved."

Sampson, Q.C., for accused: The charge laid is that the accused refused to allow the Inspector to examine his sheep; the Crown must produce some evidence apart from the accused's statement to shew that he possessed sheep, otherwise no offence is proved. Besides this, the conviction on part of the first count and on the two other counts must be quashed. The portion of the first count relating to February 4th is wrong, as there is no evidence that Grove visited the farm on that day. As to the second count, Fuller, being an assistant inspector, has merely a right to accompany the inspector of the field-cornetcy, and so the offence of refusing to allow him to examine, if any, is already dealt with in the first count. The third count, which charges resistance to Fuller alone, not accompanied by Grove, is absolutely wrong,

as, according to sect. 10, an assistant inspector has the right of entering upon premises only in the absence from his field-cornetcy of the inspector; and no such absence is proved here. The conviction on these counts must be quashed and the case sent back to the Magistrate to assess the fine anew. *Queen* vs. *Seelig*, 4 H.C., 8, and *Queen* vs. *Richardson* there referred to.

Maasdorp, S.-G. (for crown): The first count is wrong in including February 4th. As to the second and third counts, the chief is by sect. 10 vested with all the powers of the inspector of a field-cornetcy, but, possibly by an omission in the Act, similar powers are not conferred upon his assistants; they have merely a right of accompanying the field-cornetcy inspector. If "inspector" could be taken to include chief-inspector, assistant-inspector and inspector of field-cornetcy, the three counts would be properly laid, but this seems impossible in view of the interpretation clause (sect. 4).

Cur. adv. vult.

Posteà (Feb. 27).

BARRY, J.P.: This case comes on review from the Resident Magistrate of Britstown, before whom on the 18th inst. accused was convicted of contravening sections 9 and 10 of the Scab Act No. 20 of 1894 and sentenced to a fine of £10. The conviction was on three counts; the first charging him with refusing to allow Z. B. Grove, inspector of sheep for field-cornetcy No. 1 Britstown, to examine his sheep and obstructing Grove in the execution of his duty under the Act on the three following dates, November 26th, January 21st, and February 4th last; the second count with unlawfully, on January 21st, 1896, refusing to allow W. J. Fuller, assistant scab inspector for the district, acting under the authority of the chief inspector of sheep, and Z. B. Grove to examine his sheep and hindering them from examining them and obstructing them in the execution of their duty under the Act; the third count, with refusing on February 4th last to allow W. J. Fuller, acting under the authority of the chief inspector, to examine his sheep and hindering him from such examination and obstructing him in the execution of his duty.

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At the trial it was proved that Grove was the scab inspector for that ward and on November 26th last visited accused's farm for the purpose of inspecting the sheep. On arrival, Grove asked accused to allow him to see his sheep. The reply was: "I will not allow my sheep to be inspected." Upon being told by Grove that he had better allow the inspector, accused again refused, saying, "I have no occasion to be inspected, I am master of my own farm." Grove then reported the matter to the chief inspector in Cape Town, and acting under his instructions on January 21st again visited the farm in company with W. J. Fuller, the assistant scab inspector, when Fuller explained to accused who he was, offered to explain anything in the Scab Act, asked him to state whatever grievance he had, and to allow him to inspect his sheep. Accused again refused, and in consequence no inspection took place. From Grove's evidence it appears that on January 21st he inspected the sheep of accused's father with the latter's permission, and on the same day Grove saw sheep on the accused's farm in the act of being shorn, accused himself being one of the shearers. At the trial it was argued for accused that he could not be convicted, because it was not proved that he had any sheep to inspect. This argument was not, however, pressed before us by counsel, and inasmuch as there were sheep on the farm actually being shorn by accused himself, and accused refused to allow any sheep to be inspected on that farm, there is evidence, even independent of accused's words, which justifies the conclusion that he had sheep and that he refused to allow these to be inspected. *Mr. Sampson* for accused, relied, however, upon the absence of proof that on February 4th Grove was refused inspection. It is clear from the evidence that Grove was not on the farm at all on February 4th, and that the inspection then refused was to Fuller, the assistant inspector. There should therefore be a verdict of guilty on the first count only of refusing to allow inspection to Grove in November and January. With regard to the second and third counts, it is contended that there should be an acquittal on both these, because the 9th and 10th sections do not support a conviction for refusing to allow inspections by Fuller either in January or February, as, although Fuller was appointed assistant inspector by the chief inspector, such assistant has only the powers of the inspector in the

absence from the field-cornetcy of the latter. The words of section 9 are:

"No person shall refuse to allow any inspector to enter upon any land or to examine any sheep . . . and every person shall, when requested by any such inspector, in accordance with regulations made by Government, render him every reasonable assistance."

The words of section 10 are:

"Every chief inspector may enter upon any land or premises and be vested with all the powers in any field-cornetcy of any inspector of such field-cornetcy, and the assistants of the chief inspector, acting under his authority, have the right of supervising and directing the carrying out the duties of the inspectors and accompanying them in the discharge of such duties."

but apparently only "in the absence of the inspector" has the assistant, authorized by the chief inspector, any right of entering upon premises such as that conferred on the inspector.

The evidence clearly proves that the inspector Grove was not absent from the field-cornetcy in either January or February; in fact, in January he was actually present when Fuller paid his visit. We must therefore yield to *Mr. Sampson's* contention that hindering the assistant inspector Fuller on those occasions cannot be regarded as an offence. No rule or regulation creating a penalty for contravening any of the sections framed under section 54 of the Act could override the express provisions of this 10th section, and therefore if a regulation had in express terms provided a penalty for the hindering of an assistant inspector in presence of the inspector, that penalty could not have been enforced. There does not, however, appear to be such a regulation. Our order is that the present sentence be quashed; also that the convictions on the second and third counts be quashed; and that the conviction on the first count be for refusing to allow the inspector Grove to examine the sheep of accused on the 26th of November, 1895, and 21st of January, 1896; and we further order that the Magistrate pass sentence on accused for contravening section 9 in having in November, 1895, and in January, 1896, committed the acts charged in the first count.

JONES, J.: I concur. One reason operating on my mind

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is that section 10 confers certain rights on the chief inspector and assistant inspectors, which rights have correlative duties on the part of owners or occupiers of land; but the non-performance of these duties by the owner or occupier does not amount to an offence. Section 9 only applies to the particular inspector of each ward and the only offence created by it is hindering him in the execution of his duty.*

[Appellant's Attorneys, STONE & SON.]

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* [Subsequently the Resident Magistrate re-called the accused before him for the purpose of giving sentence on the first count, and imposed a fine of £6. The agent for the accused objected to these proceedings on the ground that the Resident Magistrate having passed a sentence on the first count on a conviction which on appeal had been held good, he was *functus officio*, and could not pass another sentence on that conviction; also that the Eastern District Court had no jurisdiction to remit a case for this purpose after quashing the whole sentence, and on these grounds an appeal was brought to the Supreme Court against this sentence. The appeal was dismissed by the Supreme Court (May 15th, 1896), and the sentence confirmed, DE VILLIERS, C.J., giving judgment as follows: Although under the 47th section of the Magistrates' Court Act, 20 of 1856, the Magistrates have jurisdiction without appeal or review in criminal cases, the 49th section of the same Act provides for cases of appeal against the decision of the Magistrate when certain proceedings are taken on behalf of the convicted prisoner, and in cases of appeals by way of review under the 49th section the Court has continually made use of the powers conferred upon it by the 48th section. I do not think that, in passing the Act No. 21 of 1876, in which an appeal was given against criminal convictions, it was intended to deprive the Court of the powers of the 48th section. I think that these powers still exist. Either in cases of appeal under the Act of 1856, or in cases of appeal under the Act of 1876, the Court has full power under the 48th section to make such an order as appears necessary, or remit such case to the Magistrates' Court, with such instructions relative to future proceedings in those cases as the Court shall decide. It did not quite appear under which Act the appeal took place in the Eastern Districts' Court; but in the view I have taken this is not material, because the Eastern Districts' Court would have the power to remit the case to the Resident Magistrate for the purpose of passing the requisite sentence on the prisoner. The only difficulty which arises in this case is with regard to the construction of the order of the Eastern Districts' Court. On February 17th, 1896, the Eastern Districts' Court made the following order: "The Court order the sentence to be quashed, also the convictions on the second and third counts to be quashed"—now if the judgment had stopped here there is no doubt that *Mr. Schreiner's* argument would have been perfectly good. The sentence having been quashed the Magistrate would have no power subsequently to pass any sentence on the prisoner which would include any portion of

QUEEN *vs.* BEHRENSTEIN.

Act 13 *of* 1870—*Summons—Appeal.*

Where a summons charged accused with wrongfully and unlawfully carrying on the trade of a general dealer by exposing for sale merchandise, and omitted to add the words "without having the particular licence in that behalf required," Held *that this omission was fatal to the summons, and that the conviction of accused must be quashed.*

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Queen *vs.* Behrenstein.

This was an appeal from a decision of the Resident Magistrate of Humansdorp.

Louis Behrenstein was charged with contravening sect. 6, Act 13 of 1870, in that between the 1st of January, and the 10th of February, 1896, at Humansdorp, he did wrongfully and unlawfully carry on the trade of a general dealer by exposing for sale merchandise, and on the 10th of February

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the sentence already quashed. But the order proceeds: "The Court further order that the convictions on the first count be for refusing to allow Inspector Grove to examine the accused's sheep on 26th November, 1895, and 21st of January, 1896. It is further ordered that the Magistrate pass sentence on the accused for contravening section 9 in having in November, 1895, and January, 1896, committed the acts charged in the first count." This order should be read as a whole, and if read as a whole it means no more than this: that the sentence is quashed up to a certain extent only. In other words, that the sentence is to be reduced to such an amount as the Magistrate shall award on the case being remitted. In my opinion it was quite competent for the Court to remit the case to the Magistrate for the purpose of passing a lighter sentence. That being broadly the meaning of this order, I think that the appeal must fail. There has been a little misunderstanding here about the form of the order of the Eastern Districts' Court in reference to the two first counts of the summons. A reference to the charge-sheet, which was what the Eastern Districts' Court had before it, has, however, satisfactorily cleared this up. It seemed at first that the accused had virtually been sentenced on a count which had also been quashed, but, as I say, I think that has fully been explained. The judgment proceeds only on the charge-street, and the counts quashed are the second and third counts in the charge-sheet. It was, further, quite competent for the Magistrate still to consider the first count as one which had not been quashed, and that count includes both the dates on which the alleged offences were committed. For these reasons I am of opinion that the appeal must be dismissed.]

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selling a ring for 10*s.* 6*d.* to Isaac Witbooi. From the evidence it appeared that the accused had a licence as general dealer up to the end of December, 1895, when he advertised that he was selling off his goods, and held a sale. He had no licence for 1896, but as he appeared to have goods on sale a trap was sent to the shop, who bought the ring from a shopman in the presence of accused. The sale of the ring was admitted.

Accused was found guilty and sentenced to pay a fine of £7 10*s.*; from this finding he now appealed.

The grounds of appeal were, (1) that the charge is improperly laid; (2) that the section under which the charge is laid creates no offence.

Blaine, for appellant: The charge does not state that he carried on the trade of a general dealer *without having a licence*, which is apparently the offence indicated; without the addition of these or similar words no offence whatever is stated in the charge.

Besides, the section under which the charge is laid creates no offence: sect. 6, Act 13 of 1870, provides:

"If any person, who should in conformity with Act 3 of 1864 and the schedule thereunto annexed, take out a licence authorizing him to exercise any trade, business, etc. . . . shall be proved, without having previously taken out the particular licence in that behalf required, to have done any act amounting to the exercise of that trade, business, etc., such person shall, in the absence of any special and greater penalty provided by any law now in force or hereafter to be passed in that behalf, for every such act forfeit any sum not exceeding five times the amount of the charge or duty payable for or in respect of the taking out of the particular licence which such person ought to have taken out."

Act 3 of 1864 then referred to, with its schedule, contains no mention of general dealers.

[JONES, J.: Is not the later schedule by Act 38 of 1887 simply substituted for that annexed to 3 of 1864?]

In any case the charge should be of contravening sect. 2, Act 38 of 1887, which creates the duty of taking out this particular licence and adds a penalty to the omission. *Queen* vs. *Sepongo* (4 E. D. C. 271), decided that sect. 6, Act 13 of 1870, did not create any offence; so *Queen* vs. *Vorster* (1 Juta, 390). Since then the practice adopted is to charge a contravention both of this section and sect. 2 of Act 38 of 1887, or else a contravention of the latter section

only. *Queen* vs. *Poppe* (9 Juta, 506); *Queen* vs. *Ohlsson* (10 Juta, 22).

Maasdorp, S.-G., for the Crown: The only case appearing to decide that this section does not create an offence is *Queen* vs. *Sepongo*, and the decision there was mainly based on *Queen* vs. *Vorster*, which does not support it. The general practice is to frame the charge as here, and there are many cases where that has been done and a conviction sustained: *Queen* vs. *Rittman* (4 E. D. C. 309); *Queen* vs. *Shortal* (5 Juta, 203); *Queen* vs. *Strangman* (5 Juta, 82); *Queen* vs. *Candler* (7 Juta, 73); *Queen* vs. *Thesen* (7 Juta, 105); *Queen* vs. *Ingram* (9 E. D. C. 150); *Queen* vs. *Lisard* (3 *Cape Law Journal*, 90); *Queen* vs. *Paxton* (3 *Cape Law Journal*, 157); *Queen* vs. *Horsley* (2 *Cape Law Journal*, 257). As to the omission of the words "without having a licence," exception should have been taken to this at the trial, and the charge would have been amended; but these words are implied in the charge as framed, and evidence was led showing accused had no licence.

Cur. adv. vult.

Postea (Feb. 29).

BARRY, J.P.: This is an appeal from a conviction before the Resident Magistrate of Humansdorp. Appellant was charged with contravening s. 6, Act 13 of 1870, in that between the 1st and 10th of February, 1896, he did unlawfully carry on the trade of a general dealer by exposing for sale merchandise, and on the 10th of February selling for 10*s.* 6*d.* a ring to one Isaac Witbooi. The charge contains nothing else; it does not allege that he sold without having a licence or without having a licence required in terms of any tariff or other Act named. The grounds of appeal argued for appellant by *Mr. Blaine*, and contained in the notice of appeal, are, (1) that the charge is improperly laid; (2) that the section itself creates no offence. The words of the section are, "if any person, who should, in obedience to Act 3 of 1864 and the schedule thereto annexed, take out any licence to exercise any trade, shall be proved, without having previously taken out the particular licence in that behalf required, to have done any act amounting to the

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exercise of such trade, he shall, in the absence of any greater penalty by any law provided for every such act, forfeit five times the amount of the licence."

In support of the second contention, *Mr. Blaine* has relied upon what was said by me in the case of *Queen* vs. *Sepongo*, where, with the concurrence of my brother judges, we quashed a conviction of two natives charged with contravening this section by killing game without a licence, and where I said that this section does not create a crime but merely substitutes other penalties for those already in force under other Acts which make the non-taking out of licences an offence in law. In saying this, the Court dealt with that part of the section which enacts that any person "who shall be proved to have performed any particular matter or thing, for the performance of which a licence shall be required, such person shall, in the absence of any special or greater penalty provided by any law now in force, or hereafter to be passed, for every such act forfeit any sum not exceeding five times the charge for such licence," and cannot be taken to have dealt judicially with any other part of the section. We then held, as the Supreme Court had previously done in *Queen* vs. *Vorster*, that killing game without a licence was properly charged under sect. 5 of Lord Charles Somerset's Proclamation, which had not been repealed. We further held that the penalty for that offence, created by Lord Charles Somerset's Proclamation, was all that was found in s. 6, Act 13 of 1870. We therefore quashed those proceedings on the ground that that offence was not created by s. 6, Act 13 of 1870, which was all that the accused in that case was charged with contravening. I see no reason to depart from that judgment, which is not, however, an authority for the position that *no* portion of s. 6, Act 13 of 1870 creates a crime. In the present case it is contended that exercising the trade of a general dealer by exposing for sale merchandise, and selling a ring, is created an offence by s. 6, Act 13 of 1870, and if the acceptance by the Supreme Court of charges under that section for carrying on such trade be proof that this offence is created by that section, there certainly seem to be some reported cases in which such charges have passed without comment, *e.g.*, *Queen* vs. *Strangman* (5 Juta, 82); *Queen* vs. *Shortal* (5 Juta, 203); *Queen* vs. *Pistorius* (5 Juta, 106). It would appear,

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however, to be the more usual, and I think the more correct course, when charging for contravention of this section, to state in the charge, as was done in *Queen* vs. *Lourie* (9 Juta, 433), that the act was done without having the licence in that behalf required in terms of the tariff, mentioning the schedule and Act creating this tariff; this I see was the course adopted in *Queen* vs. *Rittman* (4 E. D. C. 309). This was not done in the present case, and, moreover, in the present charge there is no statement that accused carried on the trade of a general dealer without a licence, and, inasmuch as it is of the essence of the offence that the act constituting the carrying on of the trade should be performed without having a licence, we must quash the present proceedings on the ground that in omitting these essential words the charge is improperly laid.

JONES, J., concurred.

[Appellant's Attorneys, STONE & SON.]

GREGG *vs.* CAMBRIDGE VILLAGE MANAGEMENT BOARD.

Act 29, 1881—*Village Management Board—Nuisance—* ultra vires.

By sect. 19, *Act* 29 *of* 1881, *a Village Management Board may make regulations to provide for the prevention, removal, or abatement of all nuisances which may tend to injure the health, destroy the comfort, or affect the rights of the inhabitants;* Held, *that a regulation "that no person shall be allowed to slaughter any animals except at such place or places as shall be set aside for that purpose by the Board, except pigs, poultry, etc.," was* ultra vires *of the Act.*

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March 14.

Gregg vs. Cambridge Village Management Board.

This was an appeal from a decision of the Resident Magistrate of East London.

Edwin Gregg was charged with having on the 15th day of December, 1895, and again on the 14th day of February, 1896, caused nine sheep and one ox, and fifteen sheep and one ox respectively, to be slaughtered by his servants or agents, Jan Davis and Jan Appel, at a place, namely,

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Farm No. 72, situate within the Cambridge Village area, such farm not being set aside for that purpose by the Board of Management of the said village, and thus and thereby contravening sect. 21 of the regulations for the management of the village of Cambridge formed under the provisions of Act 29 of 1881, Government notice No. 1283 of 1883.

Regulation 21 provides as follows:

"No person shall be allowed to slaughter any animals except at such place or places as shall be set aside for that purpose by the Board, excepting pigs, poultry, etc., and which shall be killed within some enclosed space or yard sufficiently parted off from all public thoroughfares."

Sect. 19, Act 29 of 1821 (Villages' Management Act) under which the regulations were framed provides:

"It shall and may be lawful for every board of management . . . to provide for the prevention, removal, or abatement of all nuisances within the said limits which may tend to injure the health, destroy the comfort, or affect the rights of the inhabitants at large."

Accused admitted the facts alleged; from the evidence it appeared that the village of Cambridge extended about ten miles in length and consisted mainly of farms. On the 6th of July, 1895, the Village Management Board unanimously resolved not to allow the slaughtering of stock *for sale* to take place on private property within the village area, but this resolution, adding the words *for sale* does not appear ever to have been promulgated as a regulation, Regulation 21 remaining in force instead.

Accused was found guilty and fined £2 or fourteen days imprisonment; from this decision he now appealed, the sole point relied on for the appellant being that the regulation was *ultra vires*.

Blaine, for appellant: The regulation as it stands is beyond the scope of the authority given to the Board by the Act. Under it they have power to provide for the "prevention, removal or abatement of all nuisances which may tend to injure the health or destroy the comfort of the inhabitants;" it cannot be contended that killing one sheep on a farm in an area extending ten miles would be a nuisance of this description; yet this would be an offence under the regulation. In *Tredgidga & Co.* vs. *Rondebosch*

Municipality (6 Juta, 321), it was a regulation forbidding the slaughtering of cattle *for sale* on private property that was held *intra vires* of the Municipality. Here the regulation is too wide and is *ultra vires*. *Queen* vs. *Cass and Another* (7 Juta, 324); *Queen* vs. *Unsworth and Others* (7 Juta, 353); *Cradock Municipal Commissioners* vs. *Du Plessis* (2 E. D. C. 407).

Maasdorp, S.-G., for respondents: The intention of the regulation obviously was to regulate the slaughter of cattle by butchers, but it goes further and aims at the slaughter of single animals by private individuals. However that may be done in such a manner as to become a nuisance to the neighbouring inhabitants, and the Board is given power to prevent all nuisances.

SOLOMON, J.: This appeal must be allowed and the conviction quashed. Appellant was convicted of contravening No. 21 of the Regulations for the Management of the village of Cambridge, which regulation provides that no person shall be allowed to slaughter any animals, with the exception of pigs, poultry, etc., except in such places as shall be set aside for that purpose by the Board. I think there can be no doubt that the intention of the Board in passing this regulation was to prevent the slaughter of animals for sale, that is, on a large scale in such a way as would be likely to prove a nuisance to the general public. That, I have no doubt, was their intention, but unfortunately the regulation itself is expressed in far wider terms. Under it, in a village which, as the evidence shows, extends for ten miles, all persons are prevented killing sheep or any other animals except pigs on their own premises. It is impossible to hold that such a regulation is either necessary or reasonable. The only section of the Act under which an attempt can be made to support it is that for the prevention of nuisances. If the regulation had been framed so as only to aim at slaughter houses it might fairly have been said to have come under this section, which empowers the Village Management Board to frame such regulations as may be required to provide for the prevention, removal, or abatement of all nuisances; but in the absence of words regulating or limiting its scope it appears to me to be clearly beyond the powers of the Board. It goes further

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than the prevention or abatement of a nuisance and is wholly unreasonable, and I cannot see how the conviction can be sustained. If an amendment were made in the regulation such as that apparently adopted by a resolution of the Board, it might then be fairly argued that the regulation was a reasonable one. The appeal will be allowed and the conviction and sentence quashed.

[Appellant's Attorneys, STONE & SON.]

GRAHAMSTOWN TOWN COUNCIL *vs.* JORDAN.

Municipality—Rates—Occupier's liability—Sect. 75, *Act* 23 *of* 1869.

Where a Town Council in making up its valuation roll entered one member of a firm as the owner of certain property instead of the firm who were the real owners, and after the one member of the firm so entered had become insolvent the Council sued the occupier of the premises for the rates falling due during his time of occupancy, Held, *that this mistake in the valuation roll did not free the occupier from his liability to pay the rates.*

1896. March 15. April 13. — Grahamstown Town Council vs. Jordan.

This was an appeal from a decision of the Resident Magistrate of Albany.

George Jordan, the respondent, was sued in the Court below for £13 3*s.* 4*d.*, being town rates due on the 1st of May, 1893, and the first of May, 1894, and water rates for the years 1893 and 1894 due by defendant to plaintiff, as per account annexed, in respect of a certain store situated in High Street, Grahamstown, leased by the defendant from William Page, senior, during the said years, the plaintiffs tendering to the defendant their right to any dividend payable to them by the insolvent estate of the said William Page, senior, in respect of the claim filed by them for the said rates.

In the Magistrate's Court it was admitted by defendant that the required notices of the rates due and assessed had been given in the local papers and also that the defendant had been in occupation of the premises during the period mentioned in the summons. From the evidence

it appeared that in the assessment roll for the five years ending February 1894, and the five years ending February 1899, William Page, senior, was entered as the owner of the premises in question, William Page & Sons being entered as the tenant in the former roll and no tenant's name being mentioned in the latter; that this entry was erroneous, as the owners of the property from 1874 till September 1894 were William Page, senior, William Page, junior, and Alfred Page, trading as Page & Sons, from which firm defendant, who had occupied the property for two years previously, bought it, receiving transfer on the 6th of September, 1894; that William Page, senior's, estate became insolvent about November 1894, and the plaintiffs had proved on this estate for rates, and that the remaining members of the firm were solvent. Plaintiffs had not applied to defendant for rates till after the insolvency of William Page, senior. The books of the Town Council were produced showing that the rates in question were due.

The Magistrate's judgment was absolution from the instance on the ground *inter alia* that the rate was always assessed against William Page, senior, and recovered from him, whereas it should have been levied against Page & Sons, of whom Alfred Page is still solvent.

From this judgment the Town Council, plaintiffs in the Court below, now appealed.

Maasdorp, S.-G., for appellants: Sect. 75, Act 23 of 1869 (Grahamstown Municipality Act), provides that the Town Council may, in suing for these rates, proceed against the owner or the occupier either separately or both of them in one and the same action, so the occupier's liability is quite clear. It does not matter who is entered on the roll as owner, it is the premises themselves that are assessed, and any occupier of premises so assessed is liable for the full amount of rates which become due during the time of his occupation.

King, for respondent: The occupier of property is liable for rates only if the proper steps as regards assessment have been complied with. This has not been done here; sect. 67 of the Act provides that "All persons owning or occupying property within the municipality shall be liable to be rated," and here the wrong persons have been rated. This mistake

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occurs in the valuation roll, which must be left open for inspection, and constitutes the necessary notice to owners or occupiers who may wish to object to the valuation; here neither owner nor occupier have had notice and consequently have had no opportunity of objecting to the rate. Besides, the statute is a private one and so really creates a contractual relationship between the Town Council and those liable for rates; by sect. 74 special provision is made that any occupier who shall have paid a rate shall be entitled to recover the same from the owner, but as this must mean the owner against whom the rate has been assessed, and there is no real owner assessed here, the Town Council has by its action made respondent's recourse against the owner impossible, or at least very difficult, and consequently respondent is freed from his obligation to the Town Council to pay these rates.

Cur. adv. vult.

Posteà (May 15).

BARRY, J.P.: This is an appeal from a decision of the Resident Magistrate of Albany who gave absolution from the instance to the defendant, now respondent, when sued for the town municipal rates due May 1st, 1893 and May 1st, 1894, on a store in High Street, Grahamstown, which the summons alleges was leased by Jordan from William Page, senior, during the years 1893 and 1894. In the summons the Council tendered to respondent their right to any dividend payable to them by the insolvent estate of William Page, senior, on their proof against that estate for these rates. There were four pleas: 1st, the general issue, 2nd, that this store formed portion of the landed property transferred to William Page, senior, William Page, junior, and Alfred Page, under the style of Page & Sons, on 25th October, 1874, which portion was on 6th September, 1894, transferred from them to defendant, and that the valuation of the property and rates payable thereon were never assesses against Page & Sons, but only against Page, senior. 3rd, that notice was not given to defendant that these rates became due during his tenancy. And 4th, that although the Council may have proved against Page, senior, it has not tried to recover the rates from William Page,

junior, or Alfred Page, who are solvent and within the jurisdiction of the Court. The evidence before the Resident Magistrate was that in the books of the Town Council this store stood in 1893 and 1894 in the name of William Page, senior, and not in the name of Page & Sons; that the town and water rates amounting to £13 3*s.* 4*d.* for 1893 and 1894 are unpaid; that the Council has proved for this amount on the insolvent estate of William Page, senior, which was sequestrated in November, 1894, alleging in that proof that the Council had recurrence against the defendant. The evidence shews that in the valuation roll for the five years ending February, 1894, and the five years ending February, 1899, William Page, senior, is put down as the owner, while defendant's name appears in neither roll as occupier; that this property was transferred on the 5th of October, 1874, to Page & Sons, who were the registered owners from that date to the 6th of September, 1894, when they transferred it to the defendant. It is also in evidence that the rates were assessed to William Page, senior, whose estate has been sequestrated and that no special notice was given to or claim made against defendant until after William Page's sequestration. The Resident Magistrate upon this evidence granted absolution, but by consent of parties in dealing with this appeal respondent admits that the Town Council regulations have been duly promulgated and that the required notices of the rates due and assessments have been duly given in the local papers; also that the respondent was during 1893 and 1894 the occupier of the house. We have therefore now only to consider whether the Magistrate was right in granting absolution on the ground that the rate was assessed against William Page, senior, and claimed from him alone as owner, whereas it should have been assessed against Page & Sons, of which firm two of the partners are still solvent. The law dealing with the point in dispute is found in Act 23, of 1869. S. 67 of that Act provides that "All persons owning or occupying property within the municipality shall be liable to be rated;" by ss. 68 and 69 valuators shall appraise the immovable property, which valuation shall be in the office of the Town Clerk for the inspection of every owner and occupier of any property included therein, and public notice must be given of a time and place for a Court to be held to hear objections to such

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valuations. The decision of such Court shall after hearing such objections be final. By s. 73 every rate so assessed shall become due and payable; and it shall not be necessary, in any suit for the recovery of the rate, to prove anything further as to due notice having been given than its publication in one of the local papers. By the 74th section it is incumbent upon all persons liable for such rate to pay it upon the day specified and that section specially provides that any occupier who shall have paid any such rate shall be entitled to recover the same from the owner unless there be any agreement to the contrary; while s. 75 provides that the Council may in suing for these rates proceed against the owner or occupier either separately or both of them in one and the same action, but no occupier shall be liable for any rate which became payable before occupation. It appears to me under these sections that the Council having given due notice of valuation and having called upon all persons liable to pay their rates, it was the duty of defendant as occupier to pay the rates on this store for 1893 and 1894, unless they were already paid by the owner. It was also the duty of the owners, Page & Sons, to pay these rates, although William Page, senior, alone was treated as owner by the Council, and the Council notwithstanding such treatment might have sued Page & Sons. The fact that the Council proved only against William Page as owner will not debar them from suing the solvent owners, and certainly will not debar the defendant as occupier, after paying these rates, from suing all the owners. This being so, I cannot agree with the Magistrate in giving absolution upon the ground stated. I may, however, add that, but for the admissions by the parties, I should have considered that absolution from the instance was not a wrong conclusion, as, except for these admissions on the facts in evidence before the Magistrate, there was no proof that defendant was occupier during 1893 and 1894. These admissions on record will be treated as part of the evidence in the case, and the appeal will be allowed and judgment entered for the appellant for £13 3*s.* 4*d.* with costs here and in the Court below.

[Appellants' Attorneys, BELL & HUTTON.
Respondent's Attorneys, STONE & SON.]

COURT *vs.* MOSENTHAL & Co.

Sale of Wool—Delivery—Constructive Delivery—Agent.

Where plaintiff sued defendant for payment of his charges for work and labour done in connection with certain bales of wool, and it appeared that defendant was the purchaser from H. L. & Co. of the said wool, stored at the time of sale in the warehouse of the plaintiff, who was paid a fixed sum by H. L. & Co. for storage and other expenses in connection with the wool, and that plaintiff on receiving notice from H. L. & Co. of the sale had entered the wool in his books as received on account of the defendant from H. L. & Co. and sent a corresponding memorandum of the wool so held to H. L. & Co., who gave it to the defendant, and defendant subsequently sent an order to plaintiff to send the wool to wash, and plaintiff in order to do so had the wool re-sewn, marked and loaded upon waggons for the defendant, Held, *that delivery of the wool did not take place till it was actually put on the waggons, and that till then plaintiff was the agent of the seller (H. L. & Co.), and not of the purchaser, and that it was as such agent of the seller that he was called on by defendant to send the wool to wash, and that consequently all work done in respect of the wool before its delivery on the waggons was part of plaintiff's original contract with the seller, and that he was not entitled to make a further charge against the purchaser for such work.**

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Court *vs.* Mosenthal & Co.

This was an action tried at the Circuit Court at Port Elizabeth before the Circuit Judge, Sir J. D. Barry, Judge-President. P. W. Court, a warehouseman and wool-washer, carrying on business in Port Elizabeth sued Adolph Mosenthal & Co. for the sum of £70 3*s.* 3*d.* The Circuit Court summons stated that between July 5th and September 17th, 1895, the plaintiff, at the special instance and request of the defendants, pressed certain wool and mohair, and re-weighed, re-marked, sewed up and loaded on waggons for transmission elsewhere various bales of wool and mohair

* Reversed on appeal by the Supreme Court, May 20th, 1896.

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in the possession of the defendants at plaintiff's warehouse, as would more fully appear from the account annexed; that plaintiff is entitled to remuneration from defendants for the services so performed at the rates charged in the said account, which rates are fair and reasonable; that plaintiff expressly notified to defendants before executing their aforesaid orders that he would make the said charges, and that defendants have failed and refused to pay the same, wherefore plaintiff prayed judgment for £70 3*s.* 3*d.* the amount of the said charges.

The defendants denied the statements contained in the plea save so far as they were specially admitted, and then, as regarded three items in the account, amounting in all to £56 17*s.*, being charges for pressing wool, admitted their liability and pleaded a tender before action; with respect to the remainder of the account, viz., "July 11th, sewing, marking and loading for wash, 140 bales of wool at 9*d.* a bale, £5 5*s.*; August 17th, sewing, marking and loading for wash, 28 bales at 9*d.* a bale, £1 1*s.*; September 3rd, sewing, marking and loading for wash, 187 bales at 9*d.* a bale, £7 0*s.* 3*d.*," amounting in all to £13 6*s.* 3*d*, their plea denied that the plaintiff had performed any work for them in connection with the wool then mentioned, and said further that the said parcels of wool were before and at the dates referred to in the account the property of certain wool sellers in Port Elizabeth, viz., Hirsch, Loubser & Co., Stewart & McDonald, the plaintiff P. W. Court and Walter MacFarlane respectively, having been deposited for valuable consideration by the said sellers for safe keeping in the warehouse of the plaintiff; that before the said respective dates the said parcels of wool were sold by the said sellers to the defendants but were not delivered; on the said respective dates the plaintiff, acting as the agent of the said sellers, delivered the said parcels of goods to the defendants; the charges made in the said three items by the plaintiff are charges connected with the delivery of the said parcels of wool by him acting as the agent for the respective sellers to the defendants; the defendants submit they are by law entitled to receive delivery of the said wool free of all charges; the defendants further say that by the usage of trade at Port Elizabeth the delivery of wool to purchasers under circumstances similar to those afore-mentioned takes

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place free of all such charges as those claimed by the plaintiff.

The question at issue in this case was whether plaintiff (a wool-presser and warehouseman in Port Elizabeth) was entitled to make a charge against defendant, a buyer of wool, amounting to 9*d.* per bale for sewing, loading up and marking of wool, which was till the time of sale stored in plaintiff's warehouse where defendant had to get delivery of it. The evidence shewed that wool in large quantities is sent down from the country to Port Elizabeth, consigned to a certain class of dealers, who will be called throughout "sellers." These sellers store the wool on its arrival at one of the eight or nine warehouses in Port Elizabeth, and for storage from its arrival to the time of sale (which may be only three or four days or as many months) are charged a uniform rate of 6*d.* per bale by the owner of the warehouse. The seller sells the wool as it stands in the warehouse to another class of dealers, termed "buyers," and wool so sold is uniformly treated in one of two ways. The buyer either instructs the warehouseman to have the wool pressed as it is in grease and sent for shipment, in which case a sum of 3*s.* 3*d.* per bale is paid by the buyer to the warehouseman for pressing and loading on railway trucks for shipment; or else he instructs the warehouseman to send the wool to the wool-wash at Uitenhage; in either case the sewing up of the bags, the re-marking with the buyer's name and mark, and the loading up is done by the warehouseman. It was admitted that the charge of 6*d.* for storage against the seller is not sufficient to leave a profit to the warehouseman, but, as each warehouseman is also a wool-presser, the prospect of pressing the wool stored with him is sufficient to induce him to store at this low rate. After wool had been washed at Uitenhage it had to be sent back to Port Elizabeth to be pressed, and for pressing this washed or "snow-white" wool a charge of 2*s.* 9*d.* per bale is made; if it is sent to a wool-presser other than the original warehouseman, it is obvious that the original warehouseman makes no profit from it except the small charge of 6*d.* per bale for storage made against the seller. Consequently for wool originally warehoused with him, then sent to be washed, and returned for pressing to a different warehouseman, plaintiff instituted an extra

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charge of 9*d.* per bale against the buyer; this defendant refused to pay, and it was to test the legality of this charge that the present action was taken, the disputed items in the accounts being all charges of 9*d.* a bale for wool bought by Mosenthal & Co. while in plaintiff's warehouse, then sent to Uitenhage to be washed, and finally sent for pressing to a warehouseman other than the plaintiff.

It was further proved that the ordinary method of sale (and that observed in the present case) was as follows: wool on its arrival was stored in a warehouse, where it could be inspected by intending purchasers; sales took place usually in the market and on a sale being effected there or elsewhere the seller sent a written or verbal message to the warehouseman telling him the quantity of wool sold and the buyer's name and asking for a return of the wool specified; these returns (*e.g.*, of wool stored in plaintiff's warehouse and sold by Messrs. Hirsch, Loubser & Co. to defendants) were in the following form:—

"PORT ELIZABETH, 17*th July*, 1895.

Return of 54 bales grease wool.

Received on account of A. Mosenthal & Co., from Messrs. Hirsch, Loubser & Co.

P. W. COURT."

A copy of this return was made in the warehouseman's produce book and the return itself sent to the seller, who, on receiving it, sent it, together with an invoice describing the wool referred to, to the buyer; sales were made for cash, to be paid usually on the Saturday after the sale, and the seller by a regulation of the Port Elizabeth Chamber of Commerce was bound to insure the purchase against risk of fire for ten days from the date of sale, or till its removal from the warehouse, if it were removed within this period of ten days; on receiving these documents, the buyer (if he wished the wool washed) would send a notice (No. 25) to the warehouseman—"Please send to wash"—describing the wool referred to, and the wool was then sewn up, re-marked and loaded on waggons by the employés of the warehouse.

Plaintiff gave evidence that he had been for sixteen or twenty years a warehouseman and wool-presser; far the larger quantity of wool stored was shipped unwashed, and this was invariably pressed in the store where it was when bought; when wool was sent to Uitenhage to be washed

he always expected that it would be sent back to him to be pressed, but finding that this was not always done he had for a period of about ten years made a charge of 6*d.* per bale against the buyer in cases where it was not so sent back; some six or seven years ago he had abandoned this charge, as pressure was brought to bear, and it was represented to him that he was the only person who made it, but when he abandoned it, he did so understanding that wool sent from his store to Uitenhage was to come back to him for pressing; he considered that the sewing, re-marking, and loading up was work done for the buyer and that the order "Please send to wash," containing as it did a description of the buyer's mark, was a direction to him to re-mark, as well as to load up; if the wool had been pulled about by people inspecting it, it would be impossible to send it to the wash without sewing the bags; when he received a notice from the seller that a return of wool was wanted, he sent a return to the seller and made a corresponding entry in his books, he considered that the property in the wool had then passed to the buyer and that his own connection with the seller was concluded, and that any further work done was done for the buyer. In 1895, on two occasions before the circumstances leading to the present action, he had had disputes with Mosenthal & Co., relative to payment for wool sent to wash; in March he had declined to send 673 bales bought by Mosenthal to wash till he got an undertaking that an equivalent would be send back to him to press, and 50 bales of this were sent back to him; again in June, 426 bales in his store were bought by Mosenthal & Co., and he declined to deliver these unless they agreed to send it back to him to press or to pay his charge of 9*d.* per bale; the wool was, however, delivered without any such agreement by his son in his absence, and in consequence he had a conversation with Mr. W. Mosenthal, of the defendant firm, in which he told him that he intended to make this charge, but Mr. Mosenthal did not agree to pay it; this conversation occurred in August, 1895. He could not mention any case in the last six or seven years in which this charge of 9*d.* a bale was paid, as buyers always preferred to send back an equivalent to be pressed.

Further evidence was called for the plaintiff to the effect that after a warehouseman had received a notification of a

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sale he then held the wool as agent for the buyer, and that all work subsequently done was done for the buyer; it was admitted by them, however, that no other warehouseman made any charge to the buyer for re-marking, loading, etc., and though plaintiff had done so in some instances, the charge had only been paid on one or two occasions and then when it was a small amount and to avoid friction; also that, although it had once been the invariable custom to send back all wool sent to wash to the original warehouseman to press, this custom had in recent years been departed from by many buyers, who had wool-presses of their own.

For the defendant, evidence was led showing that no charge was ever made against the buyer for re-loading, etc., and that sending back wool to be pressed after washing was only done as a matter of courtesy, not of right or custom. A circular was also put in, signed by the nine principal warehousemen in Port Elizabeth in 1872, which was proved to represent the present custom in the trade; according to it, a charge of 6*d.* per bale was to be made for "receiving, weighing, re-loading, store rent for a reasonable time, and including all other charges," *i.e.*, all others except pressing, for which the charge was laid down in the circular. Mr. Loubser (of Hirsch, Loubser & Co.) gave evidence, and stated that in June, 1895, when plaintiff refused to deliver wool bought by defendants from Hirsch, Loubser & Co., unless his charge of 9*d.* per bale was paid, or a promise given that the wool would be sent back to him to press, Mr. W. Mosenthal had had an interview with him, in which he said that he would not pay for the wool unless Loubser guaranteed that delivery of it should be given him. Loubser answered that he did not consider himself responsible for any delivery on the waggons, but that he would use his influence with the plaintiff to get him to comply with the defendant's wishes. In consequence, he had an interview with plaintiff's son, and the wool was eventually delivered. It appeared that after this there was some correspondence between plaintiff and the defendant firm about this charge, and at the end of this the conversation of August, 1895, took place between plaintiff and Mr. W. Mosenthal. The latter gave substantially the same account of this conversation, viz., that plaintiff told him he intended to make this charge of 9*d.* per bale in future on all wool not sent

back to him to be pressed, and that he had not agreed to this, but had said that if plaintiff gave official notice of his intention, and if the other buyers agreed to pay the charge, he might consider it; no further notice was given him.

Sampson, Q.C. (with him *Hayton*), for plaintiff: Payment is claimed for work done by plaintiff, and at the time this work was done the wool had become the property of the defendant, and it was as his agent that plaintiff re-sewed, marked and loaded up this wool. When plaintiff, on receiving notice to send a return, entered a copy of this return in his books, stating that he held the wool for defendant, this transfer in his books was sufficient to pass the property, and to make plaintiff a bailee for defendant. At all events, after defendant had sent the delivery order, "Please send to wash, etc.," to plaintiff, plaintiff then clearly held the wool as bailee for defendant, and defendant was liable for all work done after receipt of this order. "As soon as a delivery order, or dock-warrant, has been presented to a warehousekeeper, and accepted by him, this acceptance constitutes the warehousekeeper the agent or trustee of the purchaser, and there is then an executed delivery, as much as if the goods had been delivered into the purchaser's own hands": *Addison on Contracts* (6th ed.), p. 171. Further, when the seller sent to the buyer the transfer order from the warehouseman, stating that he held on behalf of the buyer, that operated as a delivery of the wool to the buyer. Property is often sold under a suspensive condition, but that does not affect the position of the bailee; if the parties allow him to become the bailee for the buyer, they are afterwards estopped from denying that he was so constituted. In any case, defendants had got notice that plaintiff was going to make these charges, and if after that notice they employed him, they were bound to pay his charges, if fair and reasonable, as the evidence showed they were.

Maasdorp, S.-G. (with him *King*), for defendant: By common law the wool, on which the work was done, does not become the buyer's property till he gets actual physical delivery of it, so all the charges till then have to be paid by the seller; but over and above the common law the usage of the trade which has been proved shows that defendant was entitled to delivery free of charge. English common

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law differs as to passing of ownership; by our law there is no transfer of ownership till delivery, so the English law only applies as an *à fortiori* argument for defendant. But even tested by English law it would be impossible to hold that the transfer by plaintiff in his books constituted him defendant's bailee; plaintiff had no authority to receive on behalf of defendant and cannot do so of his own motion. Nor could it be held that the sending of the return together with an invoice to the buyer constituted delivery; an invoice did not cease to be such because it was in two documents instead of one, and the return was, as one witness had described it, merely "a list of weights" attached to the invoice, and not a delivery order. The only document at all approaching to a delivery order is that sent by the buyee, "Please send to wash," but that is only sent for the warehouseman's convenience and its receipt does not amount to delivery sufficient to transfer possession; that is only accomplished when physical delivery takes place. It is true that part of the work charged for is what one might naturally expect the buyer to pay for, viz., the re-marking; but here trade usage comes in; all warehousemen in Port Elizabeth, except the plaintiff, and even the plaintiff himself for a number of years, do this work without charge. This is not unreasonable or unfair, as they receive payment for pressing the great bulk of wool which is exported in grease, and have a prospect of receiving back some of that sent to wash.

BARRY, J.P. (after reviewing the facts of the case): The defendants' tender must be held to be sufficient. The judgment of the Court will be for plaintiff for the amount tendered; the plaintiff to pay the costs of the suit.

An appeal was noted and the following reasons for this judgment were sent by the Judge-President to the Supreme Court:—I find that the admitted tender of £55 8*s.* 7*d.* is sufficient, and that the defendants have proved their plea. The plaintiff is not entitled to recover from defendants the balance of £13 6*s.* 3*d.* claimed in his summons. The attempt on the part of the plaintiff to annex a condition to the contract of bailment, by which the purchasers are bound to return to the warehousemen the wool after being washed for the purpose of pressing it, has not been successful, and the

evidence shows that for the sum of 6*d.* per bale the plaintiff undertook, in his agreement with the seller, to receive, carry in, make return of the wool, store it for a reasonable time, make a second return, sew up bags cut while in his custody, re-mark, and put them on the waggon for delivery to the seller. This agreement the plaintiff attempted to disturb when he discovered that defendants as purchasers were not prepared to return the wool to them for pressing after being washed by imposing upon defendants an obligation to pay the extra charges now claimed. But it is, I think, clear from the evidence that defendants had refused to recognise any right in the plaintiff to depart from his original obligation, and called upon him as the agent of the sellers and only in that capacity to deliver the wool. This delivery had not taken place until it was placed on the waggon for removal to Uitenhage. This question of delivery is in some respects the most important point in this case. I do not consider that transfer returns No. 22 and No. 23 constituted delivery to the purchaser. These documents do no more than identify the wool sold to the defendants. It is this misapprehension on the part of the plaintiff which has caused him to regard himself as a trustee for the defendants, and to attempt to alter the relation in which he stood as bailee. It is quite possible that the charge of 6*d.* per bale would not adequately remunerate the plaintiff for his work, including re-marking and delivery, unless the wool were returned to him for pressing, but when he discovered that this wool was not in every instance so returned, he could have protected himself either by increasing the charge against the seller from 6*d.* to a larger amount, or by contracting with the original bailor that in case of sale such bailor should as seller pay or secure him extra payment for delivery to the purchaser. Instead of this the plaintiff has endeavoured to lay on the purchaser an obligation to pay for work which it was the duty of the seller to have performed. If it be said that the re-marking is essentially for the benefit of the purchaser and was no part of the duty of the seller, it will be seen from the evidence of the plaintiff himself that he told Mosenthal that he declined to deliver unless Mosenthal agreed to return proceeds to plaintiff's store or to pay plaintiff's charge for delivery, and that in future he would require to be paid his charges for delivery. No mention was then made of any

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charge for re-marking, which seemed to have become an incident in connection with delivery, and was not claimed by plaintiff as a charge distinct from delivery for work done or to be done for the plaintiff's benefit. The only evidence approaching to any special request by defendants upon plaintiff to re-mark is in annexure No. 25 in the words "Please send to wash 16 bales greased wool to Union Works 100 similarly 14 bales over 101." This diamond, it may be said, the defendants requested plaintiff to put on bails as their distinctive mark, and this work plaintiff was not bound to do for defendant without compensation. An answer to this may be that defendants called upon plaintiff to do this as agent for the sellers as part of the obligation to deliver, and that therefore plaintiff should have refused to do the work unless he did so as seller's agent, and having done so, he must be regarded to have done so as seller's agent, and, moreover, that the usage of trade which plaintiff knew defendants relied upon obliged plaintiff to do so without charge. In addition to this we have plaintiff's own evidence saying: "I charged defendants 6*d.* and 3*d.* for loading up with my men and mending bales cut for obtaining samples." Nothing here is said about re-marking, and we find, moreover, that in the original account annexed to summons sewing is charged 3*d.* and marking and loading 6*d.*, which shews that the 3*d.* is not meant to cover anything but sewing, while the contention in argument is that 3*d.* is charged not for sewing but re-marking, an argument which endeavours to meet the obvious difficulty under which plaintiff would labour, seeing that both sewing and loading are duties clearly imposed upon the seller. We may, therefore, come to the conclusion that even if marking was done at request of defendants and was not covered by the 6*d.* paid by the seller, there was no intention on part of plaintiff in this action to make any claim for such marking. Plaintiff's real contention in this case seems to be that the wool, being held by him as bailee for defendants, he could, unless debarred by contract, claim from the defendant compensation for any work done in connection with this wool, and that this sewing, marking, and loading was such work for which 9*d.* would be reasonable compensation. In my opinion, plaintiff was debarred by contract with seller from making this charge at all, inasmuch as this work had already been paid for in the original 6*d.*, and in

addition to this, even if it had not been paid for, such sewing and loading were charges to be made by plaintiff not against the buyer but against seller; while as to the marking, even if it is not covered by the 6*d.* paid by the seller, it was work done by plaintiff when he was treated by defendants as agent for the seller, and that for this marking no special charge was even intended to be made by plaintiff, as his own evidence and account annexed to summons shew.

[Plaintiff's Attorneys, HAZELL, DYASON & WILSON.
Defendants' Attorneys, CHABAUD & PAGDEN.]

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PART IV.

Re PEINKE.

Practice—Garnishee Application—Notice.

In an application to attach money of a debtor in the hands of a third party, notice of the application should be served on the debtor.

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Re Peinke.

This was an *ex parte* application for an order attaching certain moneys in the hands of the Deputy-Sheriff of Albany.

The petition of the applicant, Frederick Peinke, stated that on the 1st of March, 1896, petitioner got provisional judgment on a promissory note for £150 against one John Stock of Berlin, and that on the 6th of March a warrant was issued in pursuance of the judgment against his movables, and all his known movable property was attached. On the 12th day of March one C. J. Egan got judgment against the same John Stock in the Eastern District Court for £250 on a mortgage bond, that a warrant was issued in satisfaction of this and that the movable property already attached, which realised £115 5*s.* 4*d.*, had to be shared with this second creditor, petitioner receiving £41 17*s.* 6*d.* and Egan £72 7*s.* 10*d.*, that petitioner's original debt, with costs, was £154 13*s.*, and that, consequently, an amount of £112 15*s.* 6*d.*

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was still due to him; that in pursuance of Egan's warrant certain landed property of Stock was sold and realised more than was sufficient to satisfy the amount of that warrant; that Stock has left the neighbourhood of King Williamstown and that petitioner is unable to ascertain his whereabouts; petitioner wishes that his debt should be satisfied out of any moneys that are or may be in the hands of the sheriff, after satisfying the exigency of Egan's warrants and prays for an order attaching the same in the hands of the sheriff.

There was also an affidavit from Mr. A. S. Hutton stating that he had seen the liquidation account in reference to the sale of the immovable property above mentioned, and that after paying Egan there would be a balance of £94 19*s.* 6*d.* remaining.

Maasdorp, S.-G., for petitioner, asked for an order on the deputy-sheriff to pay over to the petitioner whatever balance he had in his hands after satisfying the writ against the estate.

[BARRY, J.P.: Should not notice of this application have been given, and can we do anything more now than grant a rule *nisi?* I think in a case last term it was stated here that the practice of the Supreme Court was to grant such orders *ex parte*, but there was a case reported only a few days ago which shows that such is not their usual practice.*]

Maasdorp, S.-G.: In the present case Stock has absconded and we have a writ against him, but instead of using it we ask for this order; there is no necessity to give the sheriff notice.

Per Curiam: A rule *nisi* will be granted returnable on May 24, calling on the sheriff to show cause why he should

[* The case referred to by the Judge President was probably *Re Teubes*, decided in the Supreme C urt on May 15th, 1896, and reported as follows in the *Cape Times* of May 16th:—"Mr. Jones applied for an order declaring executable in respect of a judgment of this Court, dated 1st August, 1895, against David P. Burger and his wife, certain life interest and eventual right to money in the farms Running Stream and Goree, in the district of Robertson, a writ of execution against their chattels not having produced sufficient to satisfy the said judgment. The Chief Justice said: 'The sum due is but a small one, and the Court is not prepared to make such an order without notice having been given to the defendants. The application may be renewed after such notice has been given.'"—REP.]

not pay over to the petitioner whatever proceeds of the immovable property of John Stock remained in his hands after satisfying the writ issued against it.

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[Applicant's Attorneys, BELL & HUTTON.]

MATSHOBA *vs.* KLAAS.

Native Marriage—Dowry—Immoral Contract.

Where a native, who was a Christian, arranged with the guardian of a girl, who was also a Christian, to marry her, and paid him lobola, and immediately on its payment was allowed to pass the night with the girl, and there was no direct evidence that a Christian marriage was intended to be celebrated,—Held, *that the circumstances of the case rebutted the presumption, arising from the fact of their being Christians, that the parties intended to celebrate a Christian or legal marriage.*

When plaintiff claimed back cattle paid to the defendant as dowry, on the ground that the girl for whom the dowry cattle were paid had by her conduct broken the contract as to marriage,—Held, *that as the marriage contracted for was one according to Kafir custom only, between natives residing in Cape Colony, no action for the recovery of the cattle would lie.*

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This was an appeal from a decision of the Resident Magistrate of East London.

James Klaas, the respondent (plaintiff in the Court below), had sued Charles Matshoba, the appellant (defendant below), for the delivery of two head of cattle with their progeny, or their value, £20. The summons stated that on the 1st day of June, 1895, the plaintiff was engaged to be married to one Letty Mhlabeni, and the plaintiff thereafter, about the end of August, handed to defendant the said cattle to be held by him for and in consideration of the said then contemplated marriage, and on the condition that if the marriage did not take place the said cattle were to be returned to plaintiff forthwith; that the said engagement of marriage has been broken owing to the said Letty Mhlabeni

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having been delivered of a child, of which child plaintiff is not the father, that the defendant is fully aware of this fact but has refused to return the cattle.

The defendant pleaded, (1) general issue, (2) that the cattle were parted with voluntarily by plaintiff and paid to defendant on account of dowry according to Kafir custom, and plaintiff cannot now recover them, (3) that Kafir customs are involved and that this Court has no jurisdiction to deal with the case.

From plaintiff's evidence it appeared that having met Letty Mhlabeni at church in the location he called on the 1st June, 1895, and obtained her mother's consent to marry her. On August 2nd, he again called at her house and paid two head of cattle to defendant (who was Letty's brother-in-law, and nearest male relative) as part of the dowry; that night he slept at the house of Letty's mother, but did not have sexual intercourse with Letty, though she slept under the same blanket with him; in the morning he noticed that she was pregnant, and consulted the minister of the location, who advised him to await the birth of the child. On December 29, Letty gave birth to a full-grown male child, and plaintiff at once demanded back his cattle. An agreement was put in signed by plaintiff and Letty in the presence of the minister in the following words: "I admit three months from June 1st"; this was signed on the 1st of September and was explained by plaintiff as merely giving the first date of his acquaintance with Letty. He and the minister further stated that it was agreed at this meeting that if Letty's child were born in February plaintiff was to marry her, if earlier, he was not to be considered its father; Letty denied there was any such agreement. Plaintiff and his witnesses admitted the cattle were paid "for dowry according to native custom," while the minister of the location deposed that plaintiff was a Christian native. Plaintiff deposed that he had heard Letty talking at twelve o'clock at night with one Harry Nibi in his hut; this Harry was married to her cousin and plaintiff could not see what they were doing in the hut, and though Letty had admitted that Harry was her lover, she denied having had connection with him or with any other man except plaintiff. For the defence Letty Mhlabeni alleged that plaintiff was the father of her child and that she had had intercourse with

him as early as April 1895. The defendant's evidence was to the effect that he received one head of cattle as a pledge of the engagement and the other as part of the dowry; the animal given for the engagement was according to Kafir custom never restored, whether the engagement was broken off or not; he looked on *ikazi* or payment of dowry as the legal proof of marriage; he was Letty's natural guardian and as such the cattle were his. Several letters from plaintiff to defendant were put in, the most important being the following, written in the Kafir language and dated May 13, 1895:—

DEAR FRIEND,—Let me say to you briefly I am still all right. I am writing to you again, informing you that I love you. I intend to have you as my wife, and should the fact be proved that the Lord made you out of one of my ribs there shall be no difficulty on your part in replying to me. Do not be surprised, friend, the matter is a holy one, and there is nothing strange in it. What I say to you is really a holy matter. I remain with my best regards, Yours, etc.,

JAMES KLAAS.

The Magistrate gave judgment for plaintiff with costs, the cattle to be restored, or £10 paid as their value.

In his reasons he stated that as the plaintiff was a Christian he considered that he should be presumed to have intended marrying according to European rites, and that from the plaintiff's conduct he believed that the marriage between him and Letty had never been consummated.

From this judgment defendant now appealed.

King, for appellant: The Magistrate's decision was wrong for two reasons: (1) The cattle were given as consideration for an immoral contract, viz., a marriage according to native custom, and consequently no action lies for their recovery; (2) Even if the contract contemplated a Christian marriage, its breach by plaintiff was not justified, as there was not evidence to support the Magistrate's finding that Letty Mhlabeni had been unchaste with anyone except the plaintiff himself. As regards (1) the law laid down in *Malgas* vs. *Gakavu*, 6 E. D. C. 225, and confirmed by a series of decisions culminating in *Ngqobela* vs. *Sihele*, 10 Juta, 346, is quite clear that a marriage according to native

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custom between natives domiciled in Cape Colony is not a marriage but merely an arrangement for future co-habitation and consequently nothing paid as consideration for a contract of this nature can be recovered in a court of law. The only question is whether the evidence here shows that the parties contemplated such a marriage. The plaintiff is shown by the evidence to be a Christian native, and from this a presumption arises that it was intended the marriage should be by Christian forms, nor does the fact that *lobola* was paid make this intention impossible. But this presumption is rebutted by everything else in the evidence. Though the question was distinctly raised in defendant's plea, plaintiff led no evidence to show that a Christian marriage was intended, while the indirect evidence to the contrary is very strong. Besides the fact that *lobola* was paid, all plaintiff's witnesses emphasise that it was paid "as dowry according to native custom," and defendant, the other party to the contract, says he "looked on *ikazi* as the legal proof of marriage." Then when it was paid, for the first time defendant and Letty's mother allowed her to pass the night with plaintiff; this shows that payment of *lobola* was the only form of marriage contemplated. It is not necessary to discuss (2) till this first point has been argued.

Blaine, for respondent: Plaintiff is a Christian, and that the girl was also one may be concluded from plaintiff's having met her first in church. This creates a presumption that they intended to be married legally, and this is further confirmed by their calling in the minister of the location to settle the dispute as to the parentage of the child. There is nothing to contradict this, as plaintiff denies that he had intercourse with the girl on the night of the payment of *lobola*, and the Magistrate believed this denial. His finding as to this and as to their having intended to marry according to Christian rites is conclusive.

BARRY, J.P.: I consider that the Magistrate in this case has erred on one if not both grounds on which he appears to rest his judgment. He seems to have come to the conclusion, which was an inference drawn from the facts, that it was the intention of the parties that the marriage, in consideration of which these cattle were paid, was

intended to be solemnised in a form recognised by the marriage laws of the Colony. He also seems to have come to the conclusion that no connection took place between the plaintiff and Letty Mhlabeni, and as this second conclusion is more or less based on the oath of the plaintiff, it might be urged that the Magistrate's decision on this point must be final.

As regards the first conclusion, however, it is unquestionably an inference, and the question for our decision is whether the evidence fairly justifies the inference that a marriage according to colonial law was contemplated. Now it appears to me that the evidence for the plaintiff would of itself show that the real intention was that a marriage merely by native custom should take place. One test that must be brought to bear is the payment of *ikazi;* it is, according to native custom, essential, and here we find that it was paid. According to native custom the moment it is paid, the man has access to the woman for whom it is paid, and here we find that even according to plaintiff's own account, once the cattle were paid he passed the night under the same blanket with the girl; the same night he found that she was pregnant, and this discovery in itself goes to substantiate the girl's story that he had connection with her that night, or at all events intended doing so, and that consequently the marriage contemplated was one in accordance with native custom and no other. The circumstance of his being a Christian amounts to very little, in face of what he actually did, and of what actually took place. So on the first ground I come to the conclusion that the Magistrate was wrong, and that these cattle were given as consideration for an immoral purpose, as the law can only recognise marriages which take place in this Colony, if they take place in accordance with the marriage regulations of this Colony. As regards the second point raised we would probably come to the conclusion, if it were necessary to express any opinion on the question, that the Magistrate erred here too. The admission as to the three months cannot bear any construction except that by it he admitted the possibility of his being the father of the child, so the letters that he wrote to the woman are not casual letters but are evidently those of a man and a woman who contemplated having sexual relations together. The appeal will

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be allowed, and the judgment altered into one for the defendant, respondent to pay costs here and in the court below.

JONES and SOLOMON, JJ., concurred.

[Appellant's Attorney, W. J. WYNNE.
Respondent's Attorneys, MARSHALL & DRAKE.]

RETIEF *vs.* GROENEWALD.

Damages—Remoteness of damages—Tort—Costs.

Where plaintiff had agreed to sell 50 *sheep, and in pursuance of the agreement despatched the sheep to the purchaser, and on their way they were wrongfully stopped by the defendant, who had no knowledge of this agreement, and in consequence they arrived too late to be sold,*—Held, *that plaintiff could not recover from defendant damages for the loss of sale, as such damages were too remote.*

Where plaintiff claimed special damages in an action for tort, and except for these special damages the action would have been within the Magistrate's jurisdiction and suitable to be tried by him, the Court in giving judgment for plaintiff with £5 *damages for the tort only allowed him costs on the Magistrate's court scale.*

1896. May 19. ,, 23. Retief vs. Groenewald.

This was an action for the recovery of £60 damages for the wrongful and forcible obstruction of plaintiff's sheep.

The case was commenced in the Circuit Court at Graaff-Reinet, and the evidence subsequently taken by consent of parties before the Resident Magistrate of Graaff-Reinet, and the case removed to the Eastern District Court for argument and decision.

The Circuit Court summons stated that the plaintiff was a farmer and speculator residing at Remhoogte in the division of Graaff-Reinet, and that the defendant was a farmer residing at Onrust in the same division; that in December, 1895, the plaintiff sold to one Frederick Adendorf, a butcher in Graaff-Reinet, 50 sheep at 11*s.* each, to be delivered at Graaff-Reinet on or about the 14th day of December, 1895; that on the 12th of December the plaintiff despatched the said sheep from his farm together with

others, making in all 187, the said 50 to be delivered to Adendorf in terms of the said contract. If it had not been for the unlawful acts of the defendant the said 50 would have been delivered to Adendorf, and the plaintiff would have been enabled to sell the balance of the said 187 sheep to the said Adendorf at the same price, viz., 11*s.* each; that on the said 12th of December, while the said sheep were still on plaintiff's farm, but on their way to Graaff-Reinet, the defendant wrongfully and forcibly obstructed the said sheep and prevented them from proceeding on their journey, and compelled them to return to the plaintiff's homestead. By reason of the premises the said sheep were prevented from arriving at Graaff-Reinet in time for delivery to Adendorf, and the said sale was therefore cancelled, and the plaintiff lost the said sale and also the sale of the balance of the said 187 sheep, whereby the plaintiff prayed for £60, damages and general relief, and costs of suit.

The defendant before pleading excepted to the paragraph in the summons in respect of the ground of special damage therein alleged in regard to the 137 sheep, the said ground being too remote in law, and prayed that the said paragraph should be expunged. He then pleaded the general issue. The exception was over-ruled.

The facts proved in evidence will fully appear from the judgment of the Judge-President.

At the conclusion of plaintiff's evidence *Sampson, Q.C.*, (for the defendant), applied for absolution from the instance; this was refused. At the conclusion of the defendant's evidence,—

Burke, for the plaintiff, after reviewing the evidence: The account of the obstruction given by plaintiff's witnesses must be taken to be substantially correct; the direct consequence of this obstruction was the failure to carry out the contract, as a delay was entailed in any case, though two days' further delay was caused by the scab inspector's visit being delayed by his illness. This illness, however, was in no sense the proximate cause of the delay, and afforded no excuse to the defendant against liability for damages, the result of his wrongful act. This delay caused the loss of the sale, as Adendorf was forced to buy other sheep at 14*s.* each instead of those contracted for, and then cancelled the

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contract. As to defendant's liability for these consequences, in tort, as contrasted with contract, defendant was liable for all consequences, if not so remote as to have no connection with his act. *Sneezby* vs. *Lancashire and Yorkshire Railway Co.*, L. R. 9 Q. B. 268.

Sampson, Q.C., for defendant: The evidence for the plaintiff is contradictory on many points, and cannot be accepted as true. Besides, the alleged delay was due to many causes besides the alleged act of defendant; plaintiff did not send at once for the scab inspector, and when he did send the scab inspector was too ill to come for two days. Then he never offered the sheep to Adendorf, and there was never any cancellation of the contract at all. Defendant was justified in stopping the sheep, as they were on a farm on which there was scab, and so by Act 20 of 1894 they could not legally be removed. In any case the damages claimed were too remote; no damages can be claimed unless the *injuria* and the *damnum* are in sequence, except in cases where the wrongdoer knows or could know the consequences of his act. Underhill on Torts, p. 21; *Sharp* vs. *Powell*, L. R. 7 C. P. 253; so in *Newman* vs. *East London Town Council*, 12 Juta, p. 74, the Chief Justice lays down, "The true test of liability for causing harm must after all be whether the harm complained of is such as a reasonable man should have foreseen as likely to happen." Pollock on Torts, p. 26; *Cape of Good Hope Bank* vs. *Fischer*, 4 Juta, 368; *Voet*, 9. 2. 16.

Cur. adv. vult.

Posteà (May 28).

BARRY, J.P.: This case was removed by consent of parties to this Court from the last Circuit Court at Graaff-Reinet. All the evidence has been taken on commission at Graaff-Reinet, before the Resident Magistrate, whose Court would have been the proper one to determine this case but for the special claim for damages in excess of his jurisdiction. The plaintiff in his summons alleges that in November last he sold to one Adendorf at Graaff-Reinet 50 sheep at 11*s.* each, to be delivered at Graaff-Reinet on or about December 14th; that on December 12th he despatched these

sheep from his farm together with certain others (in all 187) to Graaff-Reinet for delivery of 50 of them to Adendorf; that, but for the unlawful acts of defendant in obstructing them, these 50 would have been delivered to Adendorf in terms of the contract, and plaintiff would have been enabled to sell the balance of the 187 to Adendorf at 11s.; that on the 12th of December, while the sheep were still on plaintiff's farm on their way to Graaff-Reinet, defendant wrongfully and forcibly obstructed and prevented them from proceeding on their journey, and compelled them to return to plaintiff's homestead, whereby they were delayed and prevented from arriving at Graaff-Reinet in time for delivery to Adendorf, who consequently cancelled the contract and plaintiff also lost the sale of the balance. Damages are laid at £60.

To succeed in obtaining any damages the plaintiff must prove that defendant unlawfully obstructed his sheep; to succeed in obtaining special damages he must prove the special contract with Adendorf, and that delay in consequence of defendant's obstruction caused Adendorf to cancel the contract to plaintiff's loss, and, further, that the obstruction was the proximate and not the remote cause of such loss.

As to the obstruction there is a direct conflict of evidence between plaintiff's witnesses and the defendant, and to understand the nature of the alleged obstruction we have also to refer to circumstances in connection with an obstruction which is not the cause of action. Plaintiff's and defendant's farms adjoin; in going from plaintiff's farm to Graaff-Reinet the road passes through a gateway on to defendant's farm, where there also appears to be an old abandoned road displaced by the one now in use. On the morning of December 12th plaintiff sent from his homestead two batches of sheep, the first in charge of a herd named Wright (which are not the sheep now in dispute), which were to pass through the gateway on their way to Zeekoegat for Jacobus du Toit. The other followed in charge of a herd named Koppie, who had been specially hired to drive them to Graaff-Reinet; they were 187 in number. Both batches had to pass through the gate and through defendant's farm. After the sheep with Wright had passed through this gate and while they were on or near the old

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abandoned road the defendant stopped and examined them and seeing one with an ulcer on its back caught it, tied a reim round its neck and said to Wright that he must turn back on the spot and go and show the sheep to plaintiff, against whom he would lodge a complaint. At this time Wright says the sheep with Koppie were visible, but still on plaintiff's farm. Defendant thereupon said to Wright: "Go and tell Koppie that he must turn back with his sheep and if he does not I will impound his sheep and imprison him." Wright says that he turned back with his sheep in consequence and delivered to Koppie defendant's message; this was before noon. Notwithstanding this Koppie moved on. Koppie confirms Wright's statement and adds that he went on because his master had sent him to Graaff-Reinet and provided him with provisions for four days, but that whilst he was still on plaintiff's farm defendant came up to him and said: "Didn't you receive my message this morning?" Koppie replied: "Yes, I did, from Wright, but I didn't turn back because my master has given me food for four days and has sent me." Upon which defendant replied: "You must turn back, because your sheep have scab," and then went through the sheep three times. Koppie then asked defendant if he had seen any scab and the reply was: "Hold your tongue or I'll give you a slap in the mouth. Go and give your master the scabby sheep; I won't allow them to pass through the gate; if they do I will impound them and imprison you." Upon this Koppie turned back. For the plaintiff we have also the evidence of Jacobus du Toit, a member of the Divisional Council, who says that on December 12th, after his mid-day meal, while he was travelling on the road over defendant's farm, defendant came up to him and said that he had driven back some sheep that had to go to Zeekoegat and had done so because they were scabby, and that he had tied a reim round the neck of one and that he hoped that he, du Toit (who was the owner of Zeekoegat), would not take it amiss. Du Toit replied that he would not, and defendant added: "I have turned back another lot of sheep belonging to Philip Retief," and, when asked if they were scabby too, replied: "Yes." This was about three P.M. Koppie's father Adam, who was reaping for defendant on December 12th, says that defendant came to the lands after

breakfast and returned again before noon, when he heard him say to his (defendant's) father that he had found some sheep belonging to plaintiff going along the road and had turned them back and that the man in charge was Wright, but that he thought Koppie was with some sheep lower down, and that he would go and turn back that lot also as they came from the same place, and that after dinner defendant left a second time. Spielman, who was also working there at the same time, corroborates Adam. We have also the evidence of Holland, who says that while he was herding defendant came up to him and said that plaintiff was persecuting him by driving his sheep through his veldt along the old road, and that he had caught one of them with scab on it, and had turned them back, and that there was a second flock which he had also turned back that day.

The defendant, on the other hand, denies that he ever saw or spoke to Koppie on that day or ordered him not to drive on. He says that he saw strange sheep in his veldt in charge of a man who turned out to be plaintiff's herd Wright, and that he told him that he wouldn't allow him to drive them along that road, which was closed; that, finding a scabby sheep among them he tied a reim round its neck and told Wright (who said another flock was following) to tell the driver that if he came along the old road he would impound the sheep and send him to gaol; that he himself did not go on plaintiff's farm at all that day; that du Toit was incorrect in saying that he told him that he had turned back a second troop. He says further that he has no recollection of meeting Holland, whose statement is false, and that du Toit lies when he says he met him at three o'clock; he also gives Adam and Spielman the lie in saying he left the lands after dinner, saying he was going to turn another flock.

It is impossible, however, with the evidence before us to accept defendant's statements as correct, and we are forced to the conclusion that the statements of Wright and Koppie are correct and that defendant did go on to plaintiff's farm and there order Koppie not to come on with the sheep under penalty of imprisonment and impounding. There was, therefore, not a forcible obstruction, as the summons alleges, but an unlawful obstruction by threats and in-

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timidation, which prevented (and was intended to prevent) Koppie from passing with his sheep along the road through defendant's farm, or through the gate near it. Defendant does not in his plea justify this obstruction, but there is evidence of scab, which, if clearly proved, might possibly have justified his preventing plaintiff's sheep from passing on the ground that they would be a nuisance on any road. We have not, however, to deal with such a case. There can be no doubt, however, that defendant acted *bonâ fide* on the belief that plaintiff's sheep were scabby, and there is, moreover, evidence in support of that belief, such as the presence of an ulcer, which there is no proof was examined by the scab-inspector subsequently called in, and although plaintiff's sheep were on December 17th examined by the scab-inspector and declared free from scab it would have been more satisfactory in the circumstances if defendant had had an opportunity of being present at such examination. There is, moreover, the fact that towards the end of December scab was undoubtedly found among plaintiff's other sheep. On the other hand we have plaintiff's denial that any of the 187 sheep sent to Graaff-Reinet were scabby; also the scab-inspector's evidence that they were free from scab on the 17th and that they were subsequently sold on the market apparently free from scab.

Unless therefore debarred by the form of action plaintiff would be entitled to some damages for the unlawful obstruction, although these damages would be merely nominal and should have been sued for in the Magistrate's Court. The reason why this case has been brought here is, as the summons shows, because the special damages arising from the loss of sale to Adendorf are claimed. The evidence proves that on December 2nd it was agreed between plaintiff and Adendorf that either plaintiff should deliver to Adendorf before the end of the following week 50 sheep of a certain quality at 11*s.* each, or that plaintiff should have the right to claim for Adendorf 11*s.* each for 50 such sheep if delivered by December 14th, and that plaintiff was led to believe that if a larger number not exceeding 150 more were produced at Graaff-Reinet of a corresponding quality Adendorf would buy them at the same price. There was however no obligation in Adendorf to take more than the 50. It is also proved that 50 of the 187 sheep were sent by plaintiff with

Koppie in terms of that contract and that Adendorf would have been obliged to take them; there is however no proof that Adendorf cancelled the contract. The evidence is that plaintiff, finding that he could not send the sheep to Graaff-Reinet for delivery on the 14th, sent a message to Adendorf, who says he had to pay 14*s.* for others in consequence and was angry, but that his only reply to the message was "all right." It does not appear that the 50 were ever offered by plaintiff to Adendorf, although it is possible that the plaintiff considered that his inability to deliver them by the 14th cancelled the contract. What plaintiff actually did was to write to the scab-inspector to come and inspect his sheep, but this he did not do till the 14th; the inspection did not take place till the 17th when the inspector certified that they were free from scab; thereupon these 180 sheep were sent to Graaff-Reinet, where plaintiff himself sold them on the market and this at what he himself regarded as a sacrifice, the market being thus glutted and the price realised being only 6*s.*; as a witness for plaintiff says, "they were given away." The only fair conclusion to be drawn from the evidence is that plaintiff, in consequence of defendant's act, and not in consequence of any refusal by Adendorf to receive these sheep, assumed that the contract was cancelled and then sent in the sheep to be sold on the market for the purpose of assessing the damage. Adendorf, it is true, says he was on the market and did not buy, but there being no proof that he cancelled the contract, it is difficult to come to the conclusion that plaintiff is entitled to the special damage he claims, even if he would have been entitled to them had Adendorf cancelled the contract. The loss to plaintiff, however, by reason of such refusal would have been too remote. No notice was ever given by plaintiff of his contract with Adendorf, and without such notice it cannot be said that defendant could have contemplated such loss as the consequence of his act. Had such notice been given by plaintiff to defendant on the 12th, possibly the case might have been different. The fact that these sheep were being driven by Koppie to Graaff-Reinet was no notice to defendant that they were to be sold under a special contract, nor notice that they were to be sold at all. The rule of law seems to be that when damages arise from peculiar circumstances they are not recoverable

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unless these circumstances could be in the contemplation of the offending party. No doubt in theory damages are a compensation and satisfaction for the injury sustained, but practically there can hardly ever be a case in which they are completely so. In contract the damages which the law will allow are such as may fairly and naturally be considered as either arising from the breach, or such as may reasonably have been in the contemplation of both parties at the time they made the contract as the natural result of the breach of it. Hence (when there is a contract) the damage which would not arise in the usual course of things upon breach of contract but which do arise from circumstances peculiar to the special case are not recoverable unless the special circumstances are known to the party who breaks the contract. This is the law of England as found in the leading case of *Hadley* vs. *Baxendale*, 9 Ex. 341. An apt illustration of this rule is found in *Portman* vs. *Middleton*, 27 L. J. Ch. 231; there plaintiff had undertaken to repair a threshing machine for a third person by harvest time; for this purpose he required a new fire-box and the defendant undertook to make him one in a fortnight, but plaintiff did not tell him of his own contract to repair the threshing machine. The defendant made default in delivering the fire-box and plaintiff was in consequence unable to perform his contract and was sued by the owner of the threshing-machine and obliged to pay compensation; this compensation he sought to recover from the defendant, but failed because it could not have been in the contemplation of defendant when he made his contract with plaintiff, and was not the ordinary consequence of the breach. In tort no doubt the rule is looser than in contract, and damages are sometimes allowed as a punishment, but in torts to property the rules applicable to breach of contract generally apply; and even in cases of injuries to the person the same rule has been held to apply; thus in *Boyce* vs. *Bayliffe*, 1 Camp. 58, where an attempt was made to recover special damages for the loss of a lieutenancy which plaintiff alleged he would have obtained but for the wrongful action of defendant, it was held to be too remote (see Mayne on Damages, p. 37). In this case the loss of sale was not a loss which defendant could fairly be expected to anticipate as the result of his act and as naturally flowing from it (see Mayne, pp. 49

and 53), unless the defendant had been informed of the contract. It is not pretended that the sheep were being sent to market, for even the balance of 137 were not then intended to be sold on any market. Moreover the loss of sale to Adendorf was due in no small degree to plaintiff's neglect to inform the defendant of that contract, as he could have done on the 16th, as it is more than probable that if defendant had been informed of it by plaintiff (which could have been done at once) the sheep would have been allowed to pass and would have arrived in time at Graaff-Reinet. But without taking this into consideration the plaintiff cannot recover the special damages he claims both because it has not been proved that Adendorf cancelled the contract and because in the absence of knowledge of the contract on the part of defendant, the damage is too remote.

The question now arises whether in this case plaintiff can recover any damages. In the case of *Alexander* vs. *Armstrong* (1 Buch. Rep., p. 233) the Supreme Court held that when the plaintiff's pleadings claimed specific performance only and there is no claim of any sum of money as damages, the plaintiff is not entitled under the prayer for other relief to a judgment for damages in case he fails to obtain a decree of specific performance; that however does not apply to an action for tort and in the later case of *Jansen* vs. *Pienaar* (2 Jut. 276) where the plaintiff in the Magistrate's Court sued in tort, alleging special damages only and proved the tort but not the special damage, the Supreme Court held that the Magistrate erred in granting absolution from the instance and that the plaintiff was entitled to some damages, although he did not prove the specific damages alleged. If it be said that that ruling could apply only to cases in the Resident Magistrate's Court the answer is that there seems to be no difference in principle at least between cases tried on a Magistrate's Court summons and before a Circuit Court, and there is moreover an unreported decision of the Supreme Court, where it was held that a prayer in a Circuit Court summons is not necessary. We think therefore that plaintiff can recover nominal damages for the wrong he has proved and these we assess at £5.

The costs however will only be Magistrate's Court costs. Costs are in theory supposed to be a compensation for the expenses justly and properly incurred in suing (see Mayne,

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691). If so the additional expense of suing unnecessarily in a higher Court is not an expense properly incurred. The judgment is for plaintiff for £5 and Magistrate's Court costs.

JONES and SOLOMON, JJ., concurred.

[Plaintiff's Attorney, G. MAASDORP.
Defendant's Attorney, T. AURET.]

QUEEN *vs.* BOTHA.

Act 32 *of* 1883, *sect.* 3—*Licence—Ostrich Feather Licence—Agent.*

When accused was convicted of buying ostrich feathers for the purpose of trade without having a licence, and it appeared from the evidence that accused had no licence himself but was buying as agent for N. who had a licence, and that he was regularly employed as produce buyer by N.,— Held, *that he as agent was protected by N.'s licence and that, consequently, the conviction was wrong.*

1896. June 2; Queen vs Botha.

This was a review of a decision of the Resident Magistrate of Tarka.

Accused was charged with contravening sect. 3, Act 32 of 1883 (as amended by sect 4, Act 13 of 1886) in that upon (between) the 1st of February and the 24th of March, 1896, and at or near Waai Plaats, Casper's Kop, Blaas Kraal and other place in the district of Tarka, he, the said Jacobus Botha, did wrongfully and unlawfully buy ostrich feathers for the purpose of trade without a licence as by law required. From the evidence in the Court below it appeared that the accused, Jacobus Petrus Botha, was employed by one Hans Michael Nasted as a produce buyer, at a stated salary per month, with no commission or percentage. Nasted had a licence to carry on the trade of a buyer of ostrich feathers and resided at Cradock, where he carried on business. Accused had been in his employment for two and a half years, and had been in the habit of travelling about and buying ostrich feathers for him at farms in different districts. If the purchase money amounted to a fairly large sum it was paid by cheques signed by Nasted, if only a small sum it was paid in cash. The feathers were brought to Cradock and the particulars of sale entered then in Nasted's register. Nasted's son also acted as buyer in the same way. Of the

three occasions alleged in the summons, on two where the amounts were £5 and £12 respectively, payments were made by cheques signed by Nasted, on the other occasion, where the amount was £1 5*s.* cash was paid. On each occasion accused said he was purchasing for Nasted, and on one occasion, at all events, produced Nasted's licence. Nasted's register showed these sales properly entered, apparently on at latest the day after the sale took place; accused stated the entries were made by Nasted in his presence but did not say on what date. On this evidence accused was found guilty and sentenced to pay a fine of £50.

Sect. 3, Act 32 of 1883 (as amended) provides: "Any person who shall without a licence buy ostrich feathers for purposes of trade, as in the first section of this Act mentioned, or any person buying ostrich feathers, who shall neglect to make entries referring thereto in a book kept for that purpose as provided in the last preceding section, or any person who shall refuse to allow the production and inspection of such book shall be liable upon conviction to a penalty of not exceeding £100, or to imprisonment with or without hard labour for any period not exceeding twelve months, or to both such fine and such imprisonment."

King, for accused: The holder of a licence to sell or to buy may at common law perform these acts through an agent. This case is analogous to that of the holder of a liquor licence, who does not require to take out a licence for every shopman he employs to sell liquor. Liquor licences contain the restriction that the sale must be on certain premises, but where a licence empowers to sell (or buy) anywhere, it equally empowers to sell anywhere through an agent. This was decided in *Queen* vs. *Greef* (3 H. C. 363), where under sect. 2, Act 28 of 1883, empowering any person engaged in agriculture to sell any liquors, being the produce of his own growth, upon any public market or to any licensed dealer, it was held that this protected an agent at Griquatown, selling on behalf of a grower at the Paarl. So it has been decided that a market master, who has no licence to sell game, may sell as agent for a person holding such licence, and that a hawker may send out an unlicensed person to trade with his wagons: *Beddome* vs. *The Queen* (5 H. C. 159), and *Queen* vs. *De Kock* (3 H. C. 488).

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[JONES, J., referred to the case of *Queen* vs. *Barns* (Buch. 1879, p. 180).]

That case was decided on a different point, but there is a dictum in it which supports my argument. The Chief Justice said, "By the 6th sect. (of Ordinance 10 of 1846, which requires every person selling bread to take out a licence) the onus is thrown on the person selling bread to prove that either he was himself licensed or that he was selling for some licensed person," *i.e.*, if he were selling for a licensed person it would be a good defence.

Maasdorp, S.-G., for the Crown: I feel great difficulty in supporting the conviction. The Act being a diminution of the common law rights of the individual must be construed strictly, and though it takes away the right of buying ostrich feathers, unless a licence be first obtained, there is nothing in it to take away the right from persons who hold such a licence of buying through an agent. The analogy of the Liquor Licensing laws seems strictly in point.

BARRY, J.P.: We must allow this appeal. At common law everyone has a right to buy ostrich feathers or anything else from anyone, and he may do so either himself or through an agent. Act 32 of 1883 makes it illegal for anyone to purchase ostrich feathers for the purpose of trade unless he possesses a licence; this is a restriction on individual liberty, and as such the Act creating it must be strictly interpreted, and as there is nothing in the Act which prevents a person having such a licence from purchasing, not merely himself, but through an agent, then we must hold that his common law right to purchase through an agent remains. The Act sets forth that "it shall not be lawful for any person to deal as a buyer of ostrich feathers for purposes of trade unless such person shall have obtained a licence so to deal," and the next section provides that every purchaser of ostrich feathers under such a licence shall keep a book in which "he shall forthwith enter or cause to be entered," certain particulars as to the feathers purchased. There is nothing in this which takes away the right to purchase through an agent, or which makes the agent, through whom feathers are so purchased, liable to punishment. The Act does require that particulars of the sale shall be entered forthwith in a book, and if the accused had been indicted under sect. 3 for not making these entries

forthwith, it would have been necessary to consider how far this section was complied with, where as in this case the purchase was made at some distance from the place where the book was kept and the entries not made till some time after the purchase. On the indictment as it stands, however, this question does not arise. The conviction and sentence will be quashed.

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JONES and SOLOMON, JJ., concurred.

[Applicant's Attorneys, WRIGHT & STAPYLTON SMITH.]

O'BRIEN *vs.* HANSEN AND SCHRADER.

Right of Shooting—Shooting Lease—Landlord—Interdict.

When plaintiff had acquired for a term of years the sole and exclusive right of hunting, shooting, and pursuing game over defendant's farm, which was 400 *morgen in extent and contained on it a hotel, and had at his own expense laid down a considerable number of pheasants and partridges, and now asked for an interdict restraining defendant from laying down a racecourse on the farm and holding quarterly race-meetings, and it appeared that the course was laid down on a portion of the farm unsuitable to game, and the evidence as to the disturbance of game by the one race-meeting already held was weak and conflicting,*—Held, *that there was nothing to show that the inevitable consequence of making the racecourse and holding races must be to disturb the game permanently, and that plaintiff had not proved that any damage had actually been suffered, and that, consequently, the interdict must be refused.*

Per SOLOMON, J.: *When there is a lease of the shooting rights over a property the owner of the property is not thereby precluded from managing it in the ordinary way and improving it, even if in doing so he interferes seriously with the shooting; if, however, the owner deals with it in an extraordinary and unusual manner, if this involves substantial damage to the shooting, the lessee has a right to an interdict.*

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This was an action in which plaintiff claimed £50 as damages for trespass on the farm "Deal Party," and an

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interdict restraining the defendant from interfering with the plaintiff's rights over that farm.

The declaration set forth that the plaintiff, Thomas O'Brien, is a law agent, residing at Port Elizabeth, and that the defendants are merchants carrying on business there under the style of Hansen and Schrader; on or about the 19th of February, 1892, the plaintiff hired from one Sarah Berry the sole and exclusive right to course, hunt, shoot, and pursue game on the farm Deal Party, then the property of the said Sarah Berry, for the term of five years from the 1st of January, 1892, with the right of renewal for a further period of five years at the expiration of that term, the said Sarah Berry further undertaking to keep off all trespassers from the farm and to prosecute the same at the expense of the plaintiff; the plaintiff had incurred considerable expense in preserving the game on the said farm and in laying down thereon game obtained from elsewhere; on the 2nd of January, 1893, the defendants purchased the said farm from the said Sarah Berry with full knowledge of the existence of the said lease and of the premises generally; during the present year the defendants have wrongfully and unlawfully and in breach of the plaintiff's said rights laid down or permitted to be laid down a racecourse upon the said farm immediately within the game preserves and hunting grounds of the plaintiff, and have cleared away a large portion of the brush and vegetation and cover thereon, and have allowed the said racecourse to be used by a certain racing club called the New Brighton Sporting Club which has advertised its first race-meeting for April 6th, 1896; by reason of the premises the plaintiff's rights under the said lease have been seriously interfered with, and a large quantity of the game has been driven away from the said farm, and if the defendants are allowed to continue the said racecourse and race-meetings on the farm the plaintiff's said rights will be irretrievably ruined and the plaintiff will be remediless in the premises.

The defendants in their plea admitted the plaintiff's lease, and that they had bought the farm with knowledge of his rights under the lease, and that with their sanction a racecourse had been laid down on the farm, but denied the other allegations in the declaration and specially denied that the plaintiff's rights under the lease had been infringed thereby.

The lease under which the plaintiff's rights were granted covenanted that the lessor let to plaintiff the sole and exclusive right to course, hunt, shoot, and pursue all game on the farm known as Deal Party during all shooting seasons for the term of five years from January 1st, 1892, with a right of renewal at the end of that term for five years further, at the same rental and stipulations; that the lessee in consideration of this lease undertakes to pay and satisfy all rates and taxes levied year by year on the said farm and property, "also to purchase and put down upon the said farm at his own cost any bucks or game either from the Colony or England; the lessee and his friends it is understood, when visiting or shooting, are to come to the hotel on all occasions; and the said Sarah Berry to prosecute all trespassers at the cost of the said Thomas O'Brien.

From the evidence it appeared that the farm Deal Party was divided into two parts, and it was over one of these parts, called New Brighton, that the plaintiff had acquired shooting rights. New Brighton is situated along the sea coast, a few miles from Port Elizabeth, and is about four hundred morgen in extent. Prior to the plaintiff's lease it was fairly supplied with buck and hares but had on it very few birds. In 1892 and 1893 plaintiff put down on the farm two or three hundred pheasants and partridges, but the pheasants, which constituted more than half the birds put down, were shown to have, for the most part, left the farm before 1896, being most probably attracted by the superior cover in the other portion of Deal Party which belonged to one Galpin. There was a conflict of evidence with regard to the number of partridges which had settled down. No shooting at all was done on the farm in 1892 or 1893 and it was not very extensively shot over in the two years after. In January, 1893, the defendants purchased the farm with full notice of plaintiff's rights, and at the commencement of 1896 permitted a racecourse, a little over a mile round in an oval shape, to be made on the farm. On April 6th, 1896, a race-meeting was held on this course and was very largely attended; the stand, which had been erected on the course, being filled with Europeans and a large number of natives being about the course all day. At the time the plaintiff entered into the lease there was a hotel on the farm, and the place was much fre-

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quented by visitors and picnic parties, the latter, however, visiting the shore along the farm and not the farm itself. This hotel was bought by the defendants with the farm in 1893. The plaintiff contended that the removal of the cover for the purpose of making the racecourse and stand, and the subsequent holding of the race-meeting with the large crowd it attracted to the farm, had seriously impaired the value of his shooting rights and claimed damages and an injunction. There was again a conflict of evidence as to whether the game had diminished in number immediately after the holding of the race-meeting, and as to the probable effect on the game of such a gathering. The evidence will appear fully from the judgments delivered.

Maasdorp, S.-G., for plaintiff: The law applicable to this case is laid down in *Pattison* vs. *Gilford* (L. R. 18 Eq. 259). There the owner of land, who had let the shooting for a term of years, advertised the land for sale in thirteen lots, and the advertisement of the sale stated that several of the lots were suitable for the erection of villas and residences but gave full notice of the shooting rights. The lessee of the shooting applied for an injunction restraining the sale and it was refused, but only on the ground that the mere sale, with notice of plaintiff's rights, was so far no interference with those rights. The headnote is as follows, "In order to obtain an injunction restraining a threatened act on the ground that if done it will be a violation of some legal right the plaintiff must show that the act must result in a violation of such right." A lessor of shooting rights consequently will be restrained from doing any act which must necessarily result in a violation of those rights. The later case of *Gearns* vs. *Baker* (L. R. 10 Ch. Ap. 353) does not contradict this principle; then it was laid down that a landowner who had demised the right of shooting for a term of years is not thereby prevented from cutting timber as he thinks fit *in the ordinary management of his lands* although injurious to the shooting. The same principle of law has been applied in the Colony to grazing rights, when it is held that the lessor cannot do anything to interfere with the rights that he has let, and indeed to all cases of letting, as a covenant for quiet enjoyment is implied, *Hepworth* vs. *Struben* (6 Juta, 254);

Watson vs. *Geard* (3 E. D. C. 422). The evidence shows that on a farm situated like this, the holding of race-meetings must drive away game from the farm; and further it is quite clear that before the meeting on April 6th there was a large quantity of game there, and that after the meeting only two or three coveys were left.

Blaine, for defendants: Any attempts to interfere with the rights of the owner of property must be strictly scrutinised. This case has been argued as if the Court would restrain any action of the owner that interfered with the rights of shooting; but that proposition is too wide. The true principle is that the owner may do what he thinks fit with his property, provided nothing be done with the intention, or with the inevitable result of rendering the shooting valueless. Shooting rights deal with a subject matter that is indefinite, and so differ altogether from grazing rights which are definite in their nature; all the right the holder of a shooting lease has is to shoot over the lands as they happen to be from time to time, and to shoot whatever game he may happen to find there. In *Gearns* vs. *Baker* the Court refused to grant an injunction restraining the owner from cutting down 7500 trees, practically the whole plantations on a property of some 1300 acres, and erecting a steam engine and saw mill on the place. MELLISH, L.J., said: "There is evidence that the cutting of the trees will prejudice the shooting this year, and I have no doubt that it will do so, but there is no evidence that the landlord is not cutting the trees *bonâ fide*, and because the trees in the ordinary and proper course of management ought to be cut."

[SOLOMON, J.: But is making a racecourse and holding races part of the ordinary management of a farm?]

It must be remembered that there is a hotel on the farm, which at the time of the lease belonged to the property, and so this racecourse was made to improve the value of the property. Besides plaintiff knew it was a holiday resort and it must have been in his contemplation that steps would be taken to render the place attractive to holiday seekers. If in doing so a few birds were driven away this was part of the risk he took on taking the lease.

BARRY, J.P.: There is a provision in the lease under

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which the lessor is bound to prosecute trespassers, how then can you justify permitting large crowds to assemble on the farm?]

That only refers to trespassers in pursuit of game, or at most people trespassing in such a manner as to disturb the game. On the evidence it is not proved that defendants have damaged the shooting. The clearing away of cover to make the course was very trifling, only a waggon load in all was removed. The crowd on the racecourse may cause the birds to leave that particular spot for a time, but they will go to other cover on the farm and will return owing to the feeding left on the ground owing to the racecourse. Any diminution of game that has been proved is due partly to the birds from the very outset preferring the superior cover on Galpin's farm and partly to disease and the ravages of vermin; but no substantial diminution has been shown.

Cur. adv. vult.

Posteà (June 9).

BARRY, J.P.: The declaration alleges that on the 19th of February, 1892, plaintiff hired from Sarah Berry for valuable consideration the sole and exclusive right to course, hunt, shoot, and pursue all game on the farm Deal Party, her property, for five years from the 1st January, 1892, with right of renewal for further period of five years, and that Sarah Berry undertook to keep off all trespassers from the farm, and to prosecute them at cost of plaintiff; that plaintiff has incurred considerable expense in preserving the game on the farm and in laying down thereon game obtained from elsewhere; that on the 2nd January, 1893, defendants bought the farm from Sarah Berry with full knowledge of this lease, but during this present year, in breach of plaintiff's rights, laid down or permitted to be laid down a racecourse upon the farm, immediately within the game preserves and hunting-grounds of the plaintiff, and have cleared away a large portion of the bush, vegetation, and cover thereon, and have allowed the course to be used by the New Brighton Sporting Club, which advertised its first meeting for April 6th last; that by reason of the premises a large quantity of the game has been driven away from the farm, and plaintiff has been prevented from

hunting on it, and has in consequence suffered damages to the amount of £50; that if defendants are allowed to continue the racecourse and race-meetings on the farm, plaintiff's rights will be irretrievably ruined, and himself remediless. The prayer is for £50 damages and an interdict to restrain defendants from again interfering with plaintiff's rights.

The defendants in their plea admit the contract and that a racecourse has been laid down on the farm with their sanction, but deny that plaintiff's rights under the contract have thereby been infringed.

To succeed the plaintiff must prove two things, that he has been prejudiced in his shooting by the course or the race-meeting, and that such prejudice is a violation of his rights. The following are the circumstances bearing on the case: The farm Deal Party, lying between Port Elizabeth and Zwart Kops river, is divided into two very nearly equal parts by a wire fence which runs on the east of the main road from Port Elizabeth to Grahamstown. Immediately on the west side of this main road and close to it runs the railway. The portion on the west, on which this road and railway run, is the property of Galpin, who strictly preserves his game, consisting of hares, buck, pheasants, and some partridges, which have for years frequented Galpin's portion, where there is good cover for game, and which cover improves for partridges as the farm ascends the western slopes away from the flats through which the main road and railway line pass. The defendants are now the owners of the other part of the farm which lies between the main road and the sea, having an average width of about 1000 yards, and is bounded on the north by the Fishwater Flats outspan, and on the south in the direction of Port Elizabeth by a creek. On it is the well-known New Brighton hotel near the sea, to which there is public access by a waggon-road from Port Elizabeth. This road diverges from the main road at certain police barracks, and after traversing the farm for upwards of 1000 yards reaches the hotel, and near the hotel itself that road is joined by another waggon-road running at right angles to the railway and coming from the railway siding. Near to this siding and on this farm there are two cottages, one an old one and long in use, the other built in 1894. All along the sea are sandhills covered with

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scrubby bush, which forms fair cover for game, and there is also some cover in the direction of the creek or Port Elizabeth. Between the waggon-road from the barracks to the hotel and the cottage there is also fair cover for a distance of between 400 and 500 yards, and good cover is continued from near the cottages up to the Fishwater Flats, and along the whole of that boundary up to the sandhills near the sea. Such cover has always existed and continues to exist. The main dispute between the parties is as to the character of the scrub on the racecourse brought into existence in April last. This racecourse, oval-shaped and one and a quarter miles in circumference, lies on the most open and flat part of the farm, is intersected by the road from the siding to the hotel, and runs over part of a straight five furlong course, which with plaintiff's acquiescence was laid down in January last and has since been displaced by the oval, the northern end of which is about 600 yards from the Fishwater Flats and touching the cover in that direction. The plaintiff in his own evidence asserts that it is the very best cover on the whole farm for partridges; in this he is not supported by his own witnesses, and is contradicted by almost every witness for the defence, the contention for the defence being that this ground is for the most part devoid of scrub, and that where there is scrub it is of such a character that partridges avoid it. It is common cause that before 1892 no partridges were ever seen on that part, and indeed that no part of the farm was frequented by them or by pheasants, although pheasants abounded on Galpin's side where a few partridges always were found and had cover. The absence of partridges from New Brighton probably arose from the nature of the soil and the fact that more suitable cover was found on Galpin's ground.

On February 19th, 1892, while Mrs. Berry was owner of the farm and herself kept the hotel, plaintiff who frequented it and was a keen and good sportsman entered into the contract set forth in the declaration, the consideration being that plaintiff was to pay all rates and taxes, amounting to about £2 a year, which fell due on the farm. There was also this further stipulation "the lessee to purchase and put down on the said farm at his own costs and charges bucks or game either from the Colony or England; the lessee and his friends, it is understood, when visiting or shooting are

to come to the hotel on all occasions, the said Sarah Berry to prosecute all trespassers at the cost of the said T. O'Brien." According to plaintiff the object of this clause was to benefit Mrs. Berry by securing to her additional custom, while affording sport to plaintiff and his friends. At this time and subsequently the grazing rights on the farm were let. After and in consequence of the lease plaintiff secured from time to time pheasants and partridges, which he laid down on the farm and entrusted more or less to the care of Herbert and Charles Berry, from whose evidence we conclude that about two hundred birds were so laid down. Some of these undoubtedly took root; according to the evidence of Herbert Berry (who lived in one of the cottages from 1879 till June, 1893, and who never saw any partridges in the farm before the lease, and who laid down those introduced by plaintiff) one covey of partridges settled at the end of the racecourse nearest to Port Elizabeth, and another near the cottages. Charles Berry states that both partridges and pheasants settled near the hotel, and just where the course now is in the direction of the flats, while Mrs. Meining, who occupied a cottage on Galpin's side near the flats, and at plaintiff's request kept an eye upon his birds, saw them and heard them between the Fishwater Flats and the course till July, 1894, when she ceased to live there. Clements, a farmer who used to travel in the early morning to Port Elizabeth, often used to see partridges and pheasants along the main road and disappearing into the New Brighton fence; he also heard them calling from the cover inside that fence, and on Good Friday last, the 3rd of April, saw a covey in the main road, which disappeared into the fence. Wel, a policeman stationed at the barracks during the last thirteen months, and who at plaintiff's request kept an eye on the birds, says he saw game at the racecourse, and game and partridges near the hotel and barracks, and two weeks after the April races on going over the racecourse saw two partridges, but since then has seen nothing. He states that these partridges flew in the direction of the Fishwater Flats, that before the races there was a covey of twelve birds near the barracks, which covey is still there. He also before the races knew of a covey of eight or ten towards the end of the course nearest the Fishwater Flats, but he cannot say

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whether they are there still, as on the later occasions when he passed over that part of the course he had no dog with him. There is also the evidence of another witness who in March, 1895, heard partridges calling from the sandhills near the hotel, and saw three partridges flying from where the course now is, and heard calling from there.

This is the evidence relied upon by the *Solicitor-General* as proving that the partridges and pheasants laid down by plaintiff had found cover and taken root all over the farm, and must have been permanently disturbed by the course and race-meeting. Uncontradicted it would at least be consistent with the intention that some of these birds had settled on or near the area since included in the oval course, but it is not inconsistent with the defendant's contention that no partridges bred in any cover on that area, and if seen there were only feeding, and always found their cover on the outskirts of the farm.

For the defendant we have the evidence of Richard Berry, the uncle of Herbert and Charles, who has known the farm for sixty years, and hired it off and on for many years, as grazing ground for his cattle. He says that until birds were let loose on it by plaintiff, there were none there and the reason was that there was scarcely any cover anywhere on New Brighton suitable for partridges, and that the racecourse is absolutely unsuitable as cover, the low thorny scrub called Doornbeeze being very objectionable to them as cover; that since plaintiff has introduced birds he has seen some near the fences; that before April last the number of partridges and pheasants on Galpin's ground had increased, and that he thought he had recognized some of plaintiff's birds on Galpin's ground and told him so, and as he had the shooting on Galpin's, he told plaintiff that he was supplying him with birds; that he had also since the lease had grazing rights over New Brighton, and had frequently been on the farm, when he only saw birds at the barracks and at the cottages, and that when any birds took root they are still to be seen. John Berry, a nephew of Matthew Berry, corroborates this last witness, and states that the racecourse area affords the very worst cover for birds and that so far from the course frightening away birds it has become a better feeding ground since the races from the manure and the remnants of food left there. Short, who has known New

Brighton for eighteen years, and who has been over the veldt since the lease, has also seen partridges near the barracks and cottages, and he too states that the cover affords no cover suitable for birds, which are, he thinks, attracted rather than disturbed by the course and the food brought there in consequence of it; and says that he thought and told plaintiff before the racecourse came into existence that he was only feeding Galpin's veldt by bringing birds on to New Brighton, as they made for Galpin's land on which there were more than ever. Another witness, Thoroughgood, who knew New Brighton well before and after the lease and since the race-meeting, condemns the racecourse as unsuitable for birds, which only have cover near the barracks and fences, and says that so far from the racecourse disturbing birds permanently, it would really supply those in cover near it with further feeding. McNab, the present hotel-keeper, is even stronger in his condemnation of the oval as affording no proper cover for birds, which never to his knowledge took cover there, and says further that vermin have made sad havoc among his poultry, and believes that most of the birds which plaintiff laid down had been killed thereby. But if we eliminate his evidence, as well as that of plaintiff, as being unreliable as a guide, it is impossible to come to the conclusion from the evidence already referred to, that plaintiff has proved that his birds have been prejudiced by the course. It is unnecessary to go into the question of the other game, as plaintiff himself does not now claim for their supposed disturbance. Thinking as we do that the course never became or could become the home of birds and that those which occasionally fed there are not proved to have been driven off New Brighton by the racecourse or the race-meeting, we cannot consider that plaintiff has established his case. But even if the plaintiff had proved that the number of birds had diminished in consequence of the racecourse and meeting, I am not prepared to say that he has proved that such prejudice was any invasion of his legal rights under this contract. LORD JUSTICE JAMES, in *Gearns* vs. *Baker* (10 Ch. Ap. 337), says that when a man (who has granted the right of shooting for a term for valuable consideration) "is minded to deal with his estate as other landholders deal with their estates, there is no right or power in this Court to interfere with him in so dealing," while in the same case

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MELLISH, L.J. added, "there is evidence that the cutting of the trees will prejudice the shooting this year and I have no doubt that it will do so; but there is no evidence that the landowner is not cutting the trees *bonâ fide* and because the trees in the ordinary and proper course ought to be cut. In our opinion the right of shooting is the right to shoot on the lands as the lands may happen to be at the time; the landlord, of course, not doing anything for the express purpose of injuring the right of shooting." If this last expression defines and contains the law, the plaintiff could not recover, even if the birds have been diminished, seeing that there is no attempt to prove that there was any want of *bona fides* on defendant's part, in granting leave to the sporting club to lay down this course for holding its meetings.

If however it be contended that cutting down trees is an act which arises out of the ordinary and proper management of an estate that is wooded, but that laying down a racecourse for race-meetings is not an act arising out of ordinary and proper management of a farm, it must be remembered that the New Brighton hotel gives the chief value to the farm, which being near to Port Elizabeth, is frequented by holiday-makers and visitors to the hotel, and that not only has the plaintiff himself stated, that one of the chief objects of the shooting lease was to secure custom to the hotel, to which no doubt the races also contributed, but plaintiff actually acquiesced in a five furlong course, part of which has since been used as part of the oval course now complained of, and that there would therefore be much force in defendant's contention that plaintiff at least cannot now be heard to say that race-meetings do not arise from the proper and ordinary management of the New Brighton estate, but are improper and extraordinary and cannot be regarded as within the reasonable contemplation of the parties now bound by the lease. It is not however necessary for the purpose of this case to determine whether there would have been an invasion of plaintiff's shooting, if there had been some proof of prejudice to the shooting in consequence of the course; seeing that we come to the conclusion that no prejudice has been proved; and this being our finding, we grant absolution from this instance with costs.

JONES, J., concurred.

SOLOMON, J.: In concurring, I would like to state briefly the view I take of the law and of the facts involved in this case. As regards the law, I do not think there is a serious difference of opinion in the views put forward by counsel for the plaintiff and for the defendant respectively. I thought at the commencement of Mr. *Blaine's* argument, that he was going to ask us to hold that no matter what amount of damage was caused to the plaintiff's shooting, he could not obtain any redress from this Court, as the defendant, being the owner of the property, could deal with it as he pleased. He did not, however, go so far as that, but only maintained that there was no ground for damages, or for an injunction, unless the plaintiff proved that material and substantial damage had been done to his rights.

The view I take of the principles to be applied to this case is as follows. The lessee of shooting rights holds his rights subject to the paramount right of the owner of the property to deal with it in any way in which property of the same description would ordinarily be dealt with; in other words, the owner of the property is not precluded from managing it in the ordinary way, or from improving it, and if in doing so, he interferes with the shooting, even seriously, that does not give the lessee of the shooting ground for an action. If, however, the owner deals with it in an extra-ordinary and unusual way, then, if this involves damages to the shooting, the lessee may come and ask this Court for an interdict. In this case, I do not consider that laying out a racecourse, and inviting the public to come once a quarter to witness races, can be looked on as part of the ordinary management of a farm, even of a farm with an old established hotel on it, and consequently I consider that if by so doing the owner inflicted substantial damage on the shooting rights, the lessee would have ground for action. I have purposely used the words *substantial* damages, as shooting rights being in their nature indefinite, it would in some cases be difficult to say whether they had been interfered with or not, and consequently a clear case must be made out showing that damage is the result before the Court will interfere with the owner's right.

As to the facts in this case, I am not satisfied that the plaintiff has shown that his rights have been substantially interfered with. When the case was first presented to us, it

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looked as if he had a very strong case indeed as regards damage. A long enumeration was given us of the game which had once been plentiful on the farm, but which had been driven away by the action of the defendants. The list comprised, pheasants, partridges, hares, bucks, and dikkops, but one after another each species was abandoned, and the plaintiff's case narrowed down to the contention that a number of partridges had taken root on the farm and that they had been driven from it. The action of the defendants which plaintiff complained of, was firstly the clearing away of scrub and cover from the farm; to this I paid very little attention, as the entire amount alleged to have been removed was very small, and its removal could not have had the injurious effect complained of. Secondly, and this was the real *gravamen*, it was contended that the holding of the races had had a most injurious effect on the game on the farm. With the evidence for this contention I am not satisfied; it would be necessary for the plaintiff, in the first place, to prove, not merely that a great number of partridges took root on the farm (and even this he has not proved adequately), but also that a great number took root near to the racecourse; but it has been proved that the cover in this neighbourhood is very bad, and that in many portions of the farm it is much superior, so it is not likely they would have settled in any quantity about there, and the evidence shows that they had not. Further, even if this point had been proved, the evidence for the plaintiff as to the disappearance of the birds after the race-meeting is absolutely unsatisfactory. Witnesses have given evidence who went to look for birds, but they went in the middle of the day, in the sun, and without any dogs. The impression they left on my mind was that they did not want to find any birds then, as they went under circumstances in which no one could expect to find any; at all events if birds had been there I am not satisfied that they would have been found by these witnesses. The plaintiff did not take the proper method of finding whether there were or were not birds on the farm, and his evidence has not satisfied me that there were not.

Only one other point remains to be considered. If the plaintiff has failed to prove that he has suffered actual harm, he must show that such harm would be the inevitable result of the defendants' action. The evidence on this point is so

conflicting that I am not prepared to say that he has proved this. Some witnesses have said that the holding of these races must tend to diminish the quantity of game on the place; others on the contrary, that the racecourse will tend to attract birds there, as the manure, droppings, remnants of forage, etc., will afford food for them. With evidence so conflicting as this, I am not prepared to say that it has been proved that damage to the shooting must be the inevitable result of the establishment of the racecourse.

For these reasons I concur in the judgment of the Court; the plaintiff has not made out his case, and consequently the judgment must be absolution from the instance.

[Plaintiff's Attorney, T. B. VAN DER RIET.
Defendants' Attorneys, BELL & HUTTON.]

QUEEN *vs.* PARKINS.

Act 13 *of* 1870, *sect.* 6—*Summons—Licence—Dealing in Aerated Water.*

In a charge under sect. 6, *Act* 13 *of* 1870, *of exercising the trade of a dealer in aerated water and cigars without having previously taken out the licence required by law, it is necessary to set forth particulars of the act or acts relied on as amounting to the exercise of the trade.*

Per SOLOMON, J.: *Where accused was charged with exercising the trade of a dealer in aerated waters without having a licence, and the evidence showed that on being asked by the inspector of licences to sell soda-water, he said he had none, but on the inspector refusing to credit this, and threatening to search the premises he produced one bottle of soda-water, which the inspector purchased, and there was nothing to show that there was any other aerated water on the premises:* Held, *that the evidence was insufficient to prove the exercise of the trade.*

This was an appeal from a decision of the Resident Magistrate of Albany.

A. W. Parkins was accused of having, between the 1st day of January, 1896, and the 1st day of May, 1896, at

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Grahamstown, contravened sect. 6, Act 13 of 1870, by wrongfully and unlawfully exercising the trade of a dealer in aerated water and cigars without having taken out the particular licence in that behalf required by Schedule 2, Act 38 of 1887.

From the evidence it appeared that accused keeps a hotel in Grahamstown and has a retail licence to sell wine and spirits. On the 1st of May, 1896, the inspector of licences for Grahamstown, on making up his books, observed that accused, whose licence to deal in aerated water and cigars had expired on December 31st, 1895, had not taken out a new one for 1896, and accordingly he sent a sergeant of police to buy lemonade at the hotel. The sergeant went and asked for lemonade but was refused it by accused; he had earlier on the same day asked accused to show him his licence, and he had replied that he had none, that he had forgotten to take it out. On the same day, after the inspector of licences had received the sergeant's report, he went himself to the hotel and gave the following evidence as to what occurred there: "I went into the bar and saw accused. I asked for aerated water, lemonade, ginger-ale, and soda-water; accused said he had none. I told him I should search his place, as I did not credit it. He thereupon produced a bottle of soda-water, for which I paid him sixpence. He had at that time no licence to sell aerated water, though he took one out later on the same day. He has been trading since January 1st without a licence." No evidence was called for accused, but it was contended that the summons was wrongly framed, as accused should have been charged with contravening sect. 6, Act 13 of 1870, as amended by sect. 2, Act 37 of 1887, and *Queen* vs. *Sepongo* (4 E. D. C. 271) was relied on as showing that sect. 6, Act 13 of 1870, did not create an offence, but only provided an additional penalty for offences.

The accused was found guilty and sentenced to pay a fine of £1 10*s.*, and from this decision he now appealed.

King, for appellant, relied on two additional grounds of appeal: 1. That the summons was defective, in that it did not set out the specific Act or Acts relied on as constituting the alleged exercising the trade: 2. There was no proof of a sale or any other act which amounted to an exercise of the

trade of a dealer. As regards 1, a summons or indictment must set forth plainly, briefly, and with certainty all the facts connected with the criminal act alleged, which are in law necessary to constitute the crime or offence imputed, and this with such certainty that the accused may be able to determine the species of offence they constitute, in order that he may prepare his defence, and that he may be able to plead an acquittal or conviction upon this indictment in bar of a prosecution for the same offence (Archbold, p. 61). There are several decisions to the effect that it is not sufficient to charge with "exercising a trade," or even exercising a trade by selling a specific article, but the name of the person or persons to whom the article was sold must be stated; here it is not even alleged what he sold or whether he sold anything. *R.* vs. *Vipond* (1 Men. 551); *Queen* vs. *Glashan* (9 E. D. C. 9); *Queen* vs. *Ingram* (9 E. D. C. 150).

[BARRY, J.P.: Can you raise this point now, it not having been raised in the Court below?]

In *R.* vs. *Vipond* a similar objection was taken for the first time in the Court of Appeal; it is only irregularities which cannot affect the verdict or otherwise prejudice the defendant in his defence, which he is held to have waived by not raising in the Court of First Instance. Here there was prejudice, as no specific act being alleged and a period of four months given as the time at which the offence was committed, it would have been impossible to prepare any defence. *Queen* vs. *De Jong* (11 Tred. and Buch. 326). On the merits there is no evidence of his exercising a trade. He refused to sell either to the policeman or to the inspector, and it was only on the latter threatening to search the premises that he produced one bottle of soda-water; it is not shown that he voluntarily sold this.

Maasdorp, S.-G., for the Crown: The cases quoted do not apply. In all of them the offence was a specific act—selling wine, or delivering gunpowder—and consequently the specific act had to be clearly stated. Here the offence is exercising the trade of a dealer, and this may be constituted by a whole course of proceeding, opening a shop, exposing wares for sale, etc., and as a number of acts might make up the offence it would be impossible to rely on merely one of them. As regards the evidence it is enough if accused,

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having no licence, had soda-water for sale, it is not necessary to show that he voluntarily sold it.

BARRY, J.P.: From what has been said in previous cases in this Court I should have thought that the principle on which the judgment in *Queen* vs. *Sepongo* rested would now have been clear, and that there would have been no more attempts to apply that principle to cases where it is obviously inapplicable, as was attempted to be done here in the Magistrate's Court. Sect. 6, Act 13 of 1870, created a penalty in the case of certain offences "where no special or greater penalty was in force by any other Act," and so in *Queen* vs. *Sepongo*, where the accused was indicted under this section, and there was already under another Act a greater penalty attached to the offence for which he was indicted (selling game without a licence), it was held that he was wrongly indicted, as it was not sect. 6, Act 13 of 1870, but the previous Act which created the crime in that case. This case is entirely different. The crime is created by this section, and as there is no special or greater penalty provided by any other Act the accused has been, so far as this point is concerned, rightly indicted. This point has not been urged by counsel here and I have only said this in order to prevent there being any further misconstruction as to the grounds on which the judgment in *Queen* vs. *Sepongo* rested.

A valid point has, however, been raised in this Court for the first time, but as it was not raised in the Court below, although a number of technical points, all of them quite untenable, were urged on behalf of the prisoner, it is not surprising that the Magistrate gave judgment as he did. As, however, the Rules of Court allow in the Magistrate's Court such points as the inadequacy of the summons to be raised under the general plea of "not guilty," and as *Vipond's* case is an authority for holding that such a point may be relied on in the Court of Appeal, even if not raised below, I consider that it can be relied on in the present case. This point is that when an indictment charges an accused with "exercising the trade of a dealer" in aerated water and cigars, it is necessary to set forth the specific act or acts relied on, which constitute the alleged exercising of the trade. This has not been done in the present case and

consequently the appellant must succeed and the conviction be quashed; but together with the conviction the summons and the whole proceedings will be quashed, so there is nothing to prevent the accused being again indicted.

JONES, J., concurred.

SOLOMON, J.: I would like to add that in my opinion there is a further ground on which this conviction must be quashed, viz., that there is not sufficient proof that the accused exercised the trade of a dealer in aerated waters and cigars, as stated in the summons. In order to prove that he carried on this trade there would have to be either evidence as to the general exercise of the trade on various occasions within the period mentioned, or else evidence of a specific sale on some particular day. The inspector of licences says: "He has been carrying on this trade for the whole four months" and nothing further. This evidence is too vague and indefinite to support a conviction; it is of such a nature that it could not possibly have been refuted by the accused, and it is certainly not sufficient to justify the verdict. Then as to the special sale alleged: the evidence shows that on that day the accused refused to sell either to the policeman or to the inspector of licences, but that, on the inspector refusing to credit that he had no soda-water on the premises, and threatening to search the place, he produced one bottle of soda-water, which the inspector purchased for sixpence. There is nothing to show that there was any other aerated water on the premises, and in my opinion the above evidence is insufficient to prove that the accused exercised the trade of a dealer in aerated water. I consider that the conviction should be quashed on this ground too, as well as on that of the insufficiency of the summons.

[Appellant's Attorneys, STONE & SON.]

MOORCRAFT *vs.* BIDDULPH.

Contract—Cancellation of Contract—Fraud—Pleading—Amendment.

Where by a contract between plaintiff and defendant plaintiff was bound to employ defendant as buyer of all stock for his butcher's business, paying him a fixed percentage, and it appeared that on several occasions defendant charged stock to plaintiff at a larger amount than he had actually paid for it, and defendant accounted for this difference in price by saying that on some occasions he had bought the stock for himself and sold it afterwards to plaintiff at its market price (there being a clause in the contract empowering him to sell his own stock to plaintiff at market price and receive the percentage thereon), and that on other occasions he received from the seller one animal as a gift or bonus for himself, and then included it at market price with the lot transferred to plaintiff, and it appeared that he did not on these occasions inform plaintiff that he was selling him his own stock or tell him of the bonus which he had received: Held, *that defendant's conduct amounted to fraud, and that plaintiff was entitled to have the contract cancelled on this account.*

When plaintiff sought to have a contract cancelled on account of fraud, and alleged in his declaration two instances of fraud, and on examining defendant's books after a discovery order, found from them ten other instances of apparent fraud, the Court after the opening of the case allowed him to amend his declaration by adding to it ten further allegations corresponding to these instances.

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This was an action in which plaintiff claimed from defendant an account of all purchases made by defendant on behalf of plaintiff under an agreement dated the 23rd of December, 1895; also the cancellation of the said agreement, by reason of the fraudulent acts of the defendant, and £500 damages for breach of agreement. Plaintiff's declaration stated that plaintiff is a butcher carrying on business at Cradock, and that defendant is a speculator and until lately

a butcher in Cradock; that on the 23rd of December, 1895, defendant sold to plaintiff the outstanding debts and goodwill of the butcher's business theretofore carried on by defendant in Cradock for the price of the total sum of the outstanding debts; that it was further agreed that the defendant should have the right to purchase all stock required by the plaintiff for the said business at a remuneration of ten per cent. commission on the purchase price paid for the said stock; that after the taking over of the said business defendant began to purchase stock for the plaintiff in terms of the said agreement, but that he had not acted in good faith towards the plaintiff, but had from time to time falsely and fraudulently overcharged plaintiff or debited him with large sums of money as and for the purchase price of stock bought by him in excess of the amounts actually paid and with ten per cent. commission on such excess and amongst others on the following occasions.

(*a*) On the 17th of February, 1896, the defendant purchased from one Barend Jacobus Opperman certain one hundred and thirty sheep, of which one hundred were bought at 11*s.* each, and thirty at 10*s.* each, or for the sum of £70 in all, but falsely and fraudulently gave out and pretended to the plaintiff that he had purchased the said sheep for 11*s.* 6*d.* each, or the sum of £74 15*s.* in all, and thus defrauded the plaintiff of the difference, the sum of £4 15*s.*, together with ten per cent. commission on the said sum.

(*b*) On the 3rd of April, 1896, the defendant bought from one Schoeman seven oxen for the sum of £40, but falsely and fraudulently pretended he had purchased the same from one Van Heerden for £42, and thus defrauded the plaintiff of the difference, viz. the sum of £2.

Defendant in his plea admitted the contract, and that he had acted under it as buyer for the plaintiff, but denied the allegations of fraud, and said as to them that the contract provided that should defendant purchase stock and allow them to run on a farm, or otherwise keep them, and at some future time hand them to plaintiff for slaughter purposes, he should be entitled to charge for such stock the then market value, plus ten per cent. commission, and not the cost price; and that under this clause the sheep and oxen mentioned in the declaration were bought for himself and afterwards sold to the plaintiff for their market value and

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not their cost price; as to the claim for an account defendant said that the books showing the details of the transactions between plaintiff and defendant were kept by plaintiff and were in his possession, and that monthly settlements have taken place between plaintiff and defendant on the said accounts.

[*Maasdorp, S.-G.*, for the plaintiff, at the opening of the case, applied to amend the declaration by adding to the paragraph alleging two instances of fraud, ten sub-sections, each specifying an instance when the defendant had represented to the plaintiff that stock was purchased for him at a higher price than was actually paid. These instances were only ascertained, after the discovery of documents, by a comparison between defendant's private stock-book and the book containing the transactions between him and plaintiff.

Sampson, Q.C., for the defendant opposed; although the order for discovery was made more than a fortnight ago, no notice of this application has been given plaintiff; it is impossible that without any opportunity of calling witnesses, or making inquiry into the transactions, he can adequately meet ten new charges of fraud, which completely alter the case he is prepared to meet. In a case similar to this it was laid down that "the charge of fraud is a grave one, and the defendants are entitled to know which of the multitudinous assets they have had to deal with fall within the scope of the charge." *Tait* vs. *Wicht and Others* (7 Juta, 158).

BARRY, J.P.: The amendment will be allowed; in the clause in the declaration asking for an account, plaintiff alleges that if a true and correct account was rendered by the defendant, it would appear that defendant has defrauded him of other sums of money in addition to those specified, so that defendant cannot say that this application takes him by surprise; the *data* for the charges too are taken from his own books, and he should be able to explain them. If however defendant finds himself prejudiced, he can apply for a postponement at any stage.

JONES and SOLOMON, JJ., concurred.]

From the evidence it appeared that E. B. Biddulph, the defendant, had been for some years carrying on the occupa-

tion of a butcher and speculator in stock at Cradock, and for five or six years had employed plaintiff, E. G. Moorcroft, as his book-keeper and manager. On the 23rd of December, 1895, the agreement mentioned in the declaration was entered into, and on June, 1896, plaintiff took over the business as his own, paying for it the book-value of the outstanding debts, while the sole right of buying for the business, with a commission of ten per cent. on purchases was reserved to defendant. The clauses of the agreement bearing on the present case were as follows:

7. The seller (the said E. B. Biddulph), shall have the right to purchase all stock required for the business of the said purchaser at a remuneration of ten per cent. commission on the purchase price paid for the stock, and should the said purchaser at any time purchase stock, dead or alive, elsewhere than through the agency of the said seller, then and in such case the said seller shall in like manner be credited with and entitled to ten per cent. commission on the purchase price of such stock bought elsewhere as aforesaid.

8. The said seller shall deliver the stock to the said purchaser in such numbers and such quantities as may be from time to time required, and the order for such number or quantity shall be given by the said purchaser to the said seller at least fourteen days before the date on which the said purchaser shall require the said stock. Delivery of stock shall be given and received at the "Shambles," Cradock.

24. And should the said seller purchase stock and allow them to run on a farm, or otherwise keep them, and at some future time hand them to the said purchaser for slaughter purposes, the said purchaser shall pay the said seller the then market value, plus ten per cent. commission for such stock, and not the cost price as aforesaid.

The clause requiring fourteen days' notice was disregarded by both parties, and according to defendant he only got a general order to buy sheep or oxen, with no number specified, but usually some days before they were required, while plaintiff said that he never gave any special orders to buy at all, as defendant knew as much, or more, about the requirements of the business as he did himself. After stock was delivered, defendant used to dictate in plaintiff's office

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the details of the purchases, which details were entered from his dictation by defendant or his book-keeper McNair in a book kept in their office, and which was always at defendant's disposal for examination. In the case of stock delivered at defendant's instance, the entry in the book gave defendant's name or initials, the name of the farmer from whom the stock had come (though in many cases this was through carelessness omitted) a description of the stock and the price with which defendant was to be credited and which with his ten per cent. commission on all purchases was paid to him monthly. These entries never showed whether stock was bought through defendant as agent, or from him personally under clause 24. A comparison of this book with defendant's private stock book showed that in the twelve instances enumerated in the amended declaration a higher price was entered in the office stock-book than that actually paid for the stock. The explanations given by the defendant of these apparent overcharges were three-fold: (*a*) In some instances, as in the two mentioned in the original declaration, he said that he had bought the stock and selected and paid for it, having at the time no special order from plaintiff, and had then let them run for a few days either on the town commonage, or on the farm where he bought them, and then had sold them to plaintiff at market value under clause 24: (*b*) In certain cases he arranged weeks or months beforehand with farmers to go out as soon as possible and select from their stock some to purchase at a fixed price; he looked on this as a sale to him and when subsequently he went out and made his selection and sent the stock the same day to plaintiff he regarded this, not as a purchase on plaintiff's account, but as selling to him his (defendant's) stock and claimed that he was entitled to charge the market value: (*c*) In other cases his book showed that after a large purchase for plaintiff he had received one or more sheep as a bonus; this bonus he regarded as his own, and selling it to plaintiff with the rest he correspondingly increased the price. Defendant alleged that in many of these cases he told plaintiff that he was selling him stock of his own, and also that he told him of the bonus or gift sheep, but both these statements were denied by plaintiff. The remainder of the facts proved will appear sufficiently from the judgments delivered.

Maasdorp. S.-G. (with him *Hutton*): The relation between principal and agent is *uberrimae fidei*, and if his good faith is disputed it is for the agent to show that he has exercised it, not for the principal to show the contrary. A mandatory is liable for fraud and deceit and also for neglect and it is his duty to see that he does not mix up his own transactions with those of his principal; if he neglects this he must bear the consequences. *Page N. O.* vs. *Ross* (2 Ap. Ca. 52); *Thomas* vs. *Benning* (Buch. 1878, 16); *Liquidators C. G. H. Bank* vs. *De Beers Co. & Dunkelsbuhler* (11 S. C. Rep. 441); Story on Agency, pars. 205 and 210. In this case the evidence shows that defendant has been secretly making a profit from his transactions as agent, and giving us wrong information to conceal his frauds. Besides a refund of the overcharge proved and an account, we ask for an order cancelling the clause which appointed him our buyer; that this can be done is shown by the analogy of the law of partnership, as a Court of Equity will dissolve a partnership on account of the gross misconduct of one partner. Lindley on Partnership, p. 238.

Sampson, Q.C. (with him *King*): Defendant under clause 24 had power to sell his own stock to plaintiff and he did so putting them in at market value. The two or three transactions when a bonus occurs cannot be defended as coming within defendant's right, and perhaps not those where he bought under a previous arrangement with the owners and immediately delivered the stock to plaintiff as his own, but he acted *bonâ fide* in these cases, thinking he had power to do this under the contract. Such a misinterpretation of his rights is very different from intentional fraud, which must be proved here as clearly as if defendant was on his trial on a criminal charge. Even if it be held to be fraud, the contract is an indivisible one, and a part of it cannot be cancelled without the cancellation of the entire agreement of sale. *MacDonald* vs. *Hume* (Buch. 1875–8); *Irvine & Co.* vs. *Berg* (Buch. 1879, 183).

BARRY, J.P.: Plaintiff alleges that defendant having been employed to buy certain stock required for plaintiff's butcher's business at Cradock, at a remuneration of ten per cent. on all such purchases, in twelve separate instances set forth in the declaration as amended, falsely represented

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that he had bought them at a higher price than he actually bought them at and so defrauded plaintiff of that excess and asks the Court to order defendant to render him a proper account of all his purchases and to refund the overcharges proved, and that so much of the contract between them as created defendant plaintiff's buyer of stock should be cancelled. The defence is that the stock delivered to plaintiff was not bought for plaintiff but sold to the plaintiff by the defendant under a clause in the contract which provided for such sale.

According to the evidence, plaintiff having been for some time the manager of defendant's butcher's business at Cradock, on the 23rd of December last agreed to buy it, taking over the accounts at what they stood in defendant's books, and the plant and furniture at valuation, and passed a bond for the total, which was found to be £1500, upon which plaintiff was to pay 7½ per cent. quarterly and had to reduce the capital by annual payments of £200. The business was taken over on the 1st of January, 1896. By the 7th clause of this agreement defendant had the right to buy all stock required for the business at a remuneration of ten per cent. on the purchase price, and should plaintiff at any time buy stock dead or alive elsewhere than through defendant, then defendant was to be credited with ten per cent. on such purchases. The agreement provided that plaintiff should give defendant fourteen days' notice of his requirements, and that the settlement of accounts between them should be monthly on the 20th of each month. Defendant had the right to inspect plaintiff's books and have access to the plaintiff's premises at all reasonable times. There is a further clause which is the one relied upon by defendant, and which runs thus: "Should defendant buy stock and allow them to run on a farm, or otherwise keep them, and at some future time hand them to plaintiff for slaughter purposes, plaintiff shall pay him the then market price, plus ten per cent. commission, and not the cost price."

Under this agreement, therefore, the defendant became plaintiff's buyer at a remuneration of ten per cent. on all purchases requested, and when no such purchases were requested, and defendant had stock of his own, which had been running on a farm or elsewhere, plaintiff was allowed

to buy them for his butcher's business at their fair market value plus ten per cent.

Plaintiff says that as the defendant had previously been the buyer for this business when it was his own property, and knew better than himself the weekly and monthly requirements of the business, instead of giving him special notice of his requirements, he instructed defendant to buy weekly, or whenever requirements arose, all that was wanted, but that he (plaintiff) never, except in two instances, bought from defendant any of his own stock. This the defendant denies, but seeing that plaintiff is supported by the circumstances to which I shall hereafter refer, and that the defendant is discredited by the books and by certain bonus transactions, while the manner in which plaintiff gave his evidence, impressed us with a conviction that he was truthful, we believe the plaintiff that he never, except on two occasions, and these not found among those alleged in the declaration, bought any stock from defendant.

The first transaction in point of time that is challenged is a purchase made by the defendant on the 10th of January of sheep from one Grobbelaar. Defendant's stock book and pocket book contain an entry of seventy-six sheep bought from Grobbelaar on the 10th of January, at 13*s.* 9*d.*, or £52 2*s.* in all. On the same date, seventy-six sheep were delivered by defendant to plaintiff, as bought for plaintiff for 14*s.*, or £53 4*s.*; that is for £1 2*s.* more than they were, according to defendant's own books, actually bought for. The defendant tries to get rid of the effect of these entries by saying that he was ordered to buy sheep, and that he bought from Grobbelaar for plaintiff only seventy-three, and that Grobbelaar gave him a lamb as a bonus on this purchase, which he regarded, and had a right to regard, as his own, because before the written agreement had been entered into this had been verbally stipulated, and that he (defendant) wishing to make his father a present of a fat wether, and himself wanting to have some excellent mutton for his own table, took advantage of the opportunity of buying from Grobbelaar two pet wethers, which he got cheap at 10*s.* each; that the bonus lamb and these two fat wethers were driven into Cradock with the seventy-three sheep, and that then the whole lot of seventy-six were disposed of to plaintiff, This is denied by plaintiff, and as defendant did not inform plaintiff of his bonus transaction, while the plaintiff's stock-

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book, to which defendant had access, and which defendant admits contains a correct entry of what he told plaintiff, contains the name of Grobbelaar as seller of all 76, it is impossible to accept the defendant's explanation as correct, or as exhibiting that good faith which the law requires to be displayed in a matter of agency, which this undoubtedly was. On this item plaintiff is entitled to receive an overcharge of £1 2*s*. The second in date was an order to purchase sheep; defendant's books show that on January 28th he bought a lot of one hundred sheep at 15*s*., and ten lambs at 7*s*. each, from one Coetzee, and eighty-seven sheep at 14*s*. from Wentzer, while on January 30th he delivered them to plaintiff as bought from Coetzee and Wentzer, and all the sheep at 15*s*. and the ten lambs at 9*s*. each, thus getting £1 14*s*. from plaintiff over and above the actual cost, in addition to the ten per cent.

These irregularities were not known to plaintiff when, on February 9th, he left Cradock to be married, and, as he says, he had before leaving about one hundred and fifty sheep in stock, and told defendant to buy for him what was wanted for the business in his absence, no one being authorised during his absence to buy any stock from defendant personally. During plaintiff's absence, on February 13th defendant's stock-book shows that he bought from one Opperman one hundred sheep at 11*s*. and thirty at 10*s*. These one hundred and thirty defendant delivered on February 17th to McNair, who was left in charge of plaintiff's business, as stock which he had bought for plaintiff at 11*s*. 6*d*. each; defendant by this overcharge gaining £4 15*s*. in addition to ten per cent. on that access, besides getting his ten per cent. on the whole purchase. Defendant says that he had no order from plaintiff to buy, and only bought these sheep because they were cheap, and that McNair bought them from him for plaintiff. This McNair denies, and we also believe plaintiff's statement that he gave no such authority to buy for him in his absence. Defendant returned from his wedding trip on February 19th, and after this, on February 26th, defendant's stock-book contains an entry of purchase from Petersen of twenty-two lambs and four goats for £12 15*s*., which were put in to plaintiff at £13; defendant's only explanation of this is that he may have made a mistake in dictating the entry.

Again on March 5th, defendant's book shows an entry of

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a purchase by him from P. L. Erasmus of fifty-three sheep at 12*s.* 4*d.* each, or £32 16*s.* (though these figures really make £32 13*s.* 8*d.*), these defendant represented to plaintiff as having been bought at 13*s.* each, thereby getting £1 13*s.* more than he was entitled to. On March 13th, defendant's books shows a purchase by him from S. Cortzee of thirty-four sheep at 12*s.* each and seventeen lambs at 7*s.* 3*d.*, or a total of £26 11*s.* 3*d.*; on the same day they are delivered to plaintiff as having been bought from Cortzee, but five of the lambs are represented as sheep, and forty sheep charged at 11*s.* 7*d.* each, and the remaining lambs at 7*s.* 6*d.* each, or a total of £27 15*s.*, defendant thus gaining £1 3*s.* Defendant tries to reduce this overcharge by saying that a bonus lamb was added and charged for, but this would only reduce the overcharge by 7*s.* 6*d.*, but seeing that the bonus lamb was the property, not of defendant as agent, but of plaintiff the principal, the excuse only renders the misconduct more conspicuous.

It was not till after these seven cases of overcharge had taken place that an eighth occurred, the discovery of which resulted in this action. On April 4th, seven oxen ordered to be bought for plaintiff were delivered by defendant as bought from Van Heerden for £42, and so entered in plaintiff's stock-book. The cheque in settlement of the purchase of these oxen made by defendant in favour of one Schœmann, the real seller, came into plaintiff's hands, and being found to be for £40, suspicions at once arose and so convinced was plaintiff of want of good faith on defendant's part that, with knowledge only of this and the Opperman transaction, he at once caused this action to be commenced. The explanation that defendant offers is that these oxen were not bought for plaintiff, but were sold to him in consequence of extra oxen being required owing to an emergency, although it appears that at that very time plaintiff had several slaughter cows recently bought for him by defendant. Plaintiff denies that he bought these oxen from defendant and also the emergency, and without giving prominence, or being influenced by the giving of the name of Van Heerden instead of Schoemann, we come to the conclusion that an overcharge of £2 must be regarded as proved.

We next find on April 7th in defendant's books eighty-

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nine sheep entered as bought by him from another Van Heerden for £56 17*s.* 3*d.*, or at 12*s.* 9*d.* each; these on the same day are delivered to plaintiff as bought for him from Van Heerden at 13*s.* 6*d.* each, causing an overcharge of £3 4*s.* 3*d.* Within the next few days, on April 13th, thirty-three sheep and three goats were delivered by defendant to plaintiff as bought for him from Strydom, the sheep at 15*s.* each, and the goats at 20*s.*, when in reality the sheep cost 14*s.* 3*d.* and the goats only 18*s.*, creating an overcharge of £1 10*s.* 9*d.*; the defendant does not deny that he was ordered to buy these and that he did buy them for plaintiff, but he says that in the hurry of purchasing them at the Cradock Agricultural Show he only made a rough entry in his pocket-book of the price of these and some other stock for plaintiff and afterwards at his leisure averaged the total prices of the purchases, in consequence of which averaging some of the stock appeared in plaintiff's books at a greater and others at a less price than was paid; as, however, plaintiff was never informed of this, while it is difficult to see why defendant should have had entered in the books this average price, instead of the price really paid, we cannot consider this explanation satisfactory.

The last two items challenged are a purchase of nineteen sheep, entered in defendant's pocket-book as bought for £13 10*s.* 4*d.*, while they are entered as delivered to plaintiff at £14 14*s.*; and a purchase of twenty-one oxen, which he admits he made for plaintiff at £175, and yet they are charged as costing £175 10*s.*; this last discrepancy is not attempted to be explained.

These over-charges proved, amount to rather more than £23, and their existence would unquestionably justify the Court in ordering defendant to render a proper account with vouchers of all the purchases made by defendant for plaintiff since January 1st last; as, however, the more important question is the claim for cancellation of defendant's power to act as plaintiff's buyer in consequence of the misconduct proved, and as defendant does not press for an account, we shall not order an account to be furnished, but order the defendant to pay plaintiff £20 for these over-charges, and at the same time we cancel so much of the agreement as makes plaintiff defendant's buyer of stock and gives defendant a right to ten per cent. on the prices of any purchases made for the

business either by plaintiff or defendant. Such cancellation we cannot deny to plaintiff, seeing that it is proved beyond all doubt that the plaintiff had not acted in his character of agent or buyer with that good faith which the law requires from an agent. In law the utmost good faith is required from an agent in all his transactions as agent and the onus of proving such good faith is placed upon the agent. Where such good faith is found wanting, and to such an extent as necessarily to create a feeling of future distrust in the principal towards his agent, the law justifies the Court in putting an end to the mandate and this we will do. The judgment of the Court will be for plaintiff for £20 and for cancellation of defendant's right under the contract to buy for plaintiff or to claim any emolument or percentage on any purchases for the business, defendant to pay costs of the suit.

JONES, J.: I concur in thinking that judgment should be for the plaintiff with costs as stated by the Judge President, and I shall briefly state the grounds upon which I base my opinion. After carefully considering the evidence laid before the Court by plaintiff and defendant, I feel compelled to come to the conclusion that the evidence of the plaintiff and his witnesses is to be preferred to that given by the defendant. I do not believe that the defendant when he delivered the stock referred to in any of the sub-sections in the declaration ever stated that he was selling his own stock to the plaintiff, or in any way led him to suppose that the stock delivered had not been purchased by him as agent for the plaintiff. The circumstances of the case seem to me to point to exactly the opposite conclusion.

The book (No. 2) kept by the defendant, and in which the entries were made at defendant's dictation, seems to me almost conclusive upon this point, at any rate in those cases in which the name of the seller has been entered after the name of Biddulph. It is true that the names appear in two separate columns, under the heading of Sellers and Addresses, but it can hardly be said that the names of the persons from whom Biddulph bought were simply put there for the purpose of enabling the plaintiff to know from where the stock came. The plaintiff's statements that these names were given as the names from whom the

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defendant bought I believe to be the truth. This evidence is supported by the testimony of McNair who gave a similar account of what was done and told exactly what happened when the entries were made in No. 2. As to McNair's evidence it seemed to me to be clear and definite and given in a straightforward manner. In every one of the instances complained of I consider the defendant acted as the agent of the plaintiff, and I go further in the view which I take of the defendant's evidence. I think that the attempt of the defendant to bring any of these purchases under sect. 24 of the agreement between plaintiff and defendant is a mere afterthought in order to avoid the effects which would follow if he had purchased as agent. The law has been clearly stated by the Chief Justice in the case of *Page N. O.* vs. *Ross* (2 Ap. Cas. p. 55), cited by the Solicitor-General, and is very tersely put by Snell in his Equity, p. 484 (7th ed.): "Agents are not permitted to become secret vendors or purchasers of property which they are authorised to buy or sell for their principals or indeed to deal validly with their principals in any case except when there is the most entire good faith and full disclosure of all facts and circumstances."

In the case before us there was neither the full disclosure of facts nor good faith, but there was both wilful misrepresentation and imposition, and when the misrepresentations were made the defendant knew that they were untrue. He knew that the prices which he charged were not those at which he had purchased and not what he represented them to be. It follows that wherever he has attempted to make a profit in this manner, either by keeping what he calls the bonuses upon the purchases made by him as agent, or by putting the stock into the plaintiff at a higher rate than that actually paid, the plaintiff is entitled to receive back the over-charges. But he is entitled to more than this. He is entitled to demand that he shall no longer be bound to continue to employ as agent one who has shown himself to be wholly unworthy of his confidence. It cannot be said that because there has been a sale of the shop and goodwill, and the creation of an appointment as agent that the whole contract must necessarily be set aside. The sale, the part of the contract already executed, can be separated from the rest of the

contract, and from the agency, and the executory part of the contract. The agency through the misconduct of the defendant cannot continue longer. It is through his fault it cannot continue. He cannot take advantage of his own wrong and insist that the plaintiff shall suffer through his misconduct, and therefore that portion of the contract which is rendered impossible by defendant's act must cease to exist. There must, therefore, be a cancellation of this portion of the contract which the defendant himself has caused it to be impossible to carry out.

Judgment for plaintiff for £20.

It is ordered that the right of defendant to buy as agent, and that in the future he forfeit his right to all emoluments arising from such purchases for the business.

Plaintiff to have his costs, and Court certifies to his expenses as a necessary witness.

SOLOMON, J.: I regret to say that I have been forced to the conclusion that the defendant in this case has not observed the good faith absolutely essential to the relationship of principal and agent. The relationship is a fiduciary one, and the strictest good faith on the part of the agent is required, and in all cases where an interest of the agent's enters into a transaction carried on on behalf of his principal he must make a full disclosure, and where this is not done, and there is any material concealment, this amounts to a breach of the implied contract between them. This general principle of law is not controverted in the present case, but the defendant shelters himself behind clause 24 of the contract, which it is said creates quite a peculiar relationship between the parties. Clause 24 is a peculiar one, and whatever its exact meaning may be, it is at all events clear that when acting under it the defendant was acting as the plaintiff's agent, supplying him with sheep of his own for the business, and consequently it was his duty to make to him a full disclosure. On the occasions, however, when defendant alleges he was selling stock of his own to the plaintiff I am forced to the conclusion that he deliberately misrepresented the facts, and represented on these occasions that he had bought the stock on the plaintiff's account from the persons whose names are entered in the book, and at the prices there mentioned. The cases numbered F, G, and H

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Moorcroft *vs.* Biddulph.

in the declaration, which have been given up as indefensible, are absolutely decisive on this point. As regards F, it appears that on March 5th defendant received fifty-three sheep from P. L. Erasmus for £32 16*s.*, viz. thirty-two at 13*s.*, twenty at 12*s.*, and two as a bonus, and then we find these sheep put in to the plaintiff on March 6th at 13*s.* each, or £34 9*s.* in all. He admits that at the time he had an order to buy, and still he wishes us to believe that he bought these sheep for himself on March 5th and re-sold them to the plaintiff on the following day. He says, indeed, that he had a previous arrangement with Erasmus, by which he had agreed to buy fifty-two of his sheep, and to come at some future date to pick them out, but if he had it would have been his duty to go on March 5th and buy these sheep from Erasmus, and then to have handed them over to the plaintiff at the price he actually paid. No argument would satisfy me that this sale of the sheep from Erasmus's farm was a *bonâ fide* transaction. The same reasoning applies to H, when seventy sheep and two goats were bought by defendant from D. S. Erasmus for £51 7*s.* 6*d.* and entered in plaintiff's book the next day at £52 5*s.* So also with G, when defendant, having an order from plaintiff at the time, bought thirty-four sheep and seventeen lambs from one Coetzee for £26 12*s.*, and then converted six of the lambs into sheep and sold the lot (adding one lamb from his own stock) to plaintiff the next day for £27 15*s.*; on this occasion it cannot even be alleged that he had a previous arrangement with Coetzee. No satisfactory explanation can possibly be given of these two transactions. When any conflict of evidence arises between plaintiff and defendant, not only is the plaintiff's evidence far more satisfactory, but he is also confirmed by his books, and there is no doubt as to the side on which truth is. I am not satisfied with the explanation which defendant gives of the transactions with Opperman and with Schoemann, and of many of the other items. On the whole the evidence shews that defendant has not observed that good faith, which as agent he was bound to observe, and consequently I concur in the judgment of the Court.

[Plaintiff's Attorneys, BELL & HUTTON.
Defendant's Attorneys, WRIGHT & STAPYLTON SMITH.]

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AMENDMENT.—Where plaintiff sought to have a contract cancelled on account of fraud and alleged in his declaration two instances of fraud, and on examining defendant's books after a discovery order found from them ten other instances of apparent fraud, the Court, after the opening of the case, allowed him to amend his declaration by adding to it ten further allegations corresponding to these instances.—*Moorcroft* vs. *Biddulph*	172
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2. APPEAL.—Where within four days of the hearing of a case in the Magistrates' Court notice of appeal was duly given, and subsequently the agent, under a misapprehension, withdrew this notice, and after the four days had elapsed wrote asking the magistrate to cancel this withdrawal: *Held*, that the appeal might be proceeded with on these facts being proved by affidavit.—*Queen* vs. *Mdani and Others* 98

BREACH OF CONTRACT. *See* CONTRACT (1) 14

2. —— *See* CONTRACT (2) 61

3. —— *See* CONTRACT (4) 172

CANCELLATION OF CONTRACT. *See* CONTRACT (4) 172

—— OF JUDGMENT.—*Semble.*—A Magistrate's Court or Superior Court has power to annul its own judgment if it is made to appear that it has been given on a complete misconception of the facts.—*Meintjes* vs. *Theunissen* 56

—— OF LEASE. *See* CONTRACT (2) 61

CIVIL IMPRISONMENT.—A decree of civil imprisonment granted against a defendant who stated that he had neither means nor employment and was with his wife and children supported by his mother, there being evidence that a promissory note made in his favour would soon become payable, and that he had said he was possessed of seven hundred sheep.—*Du Toit* vs. *Fitzgerald* 96

CONTRACT.—Where defendants took land on lease for three years at a rent of £400 a year, agreeing to keep the land in proper order, and at the end of one year broke this contract and gave back the land not in proper order, and it was proved that the lessor (who sued defendants for damages for breach of contract) could make and was likely to make £700 a year out of the land during the unexpired term, but that he could have made £1400 a year if the land had been restored in proper order: *Held*, that plaintiff was not entitled to receive as damages for breach of contract the difference between £700 and £1400 for each of the two years, nor was plaintiff entitled to set off defendant's increased gain for the two years against the sum necessary to be expended on putting the lands in order, but that the proper measure of damages to be allowed was the sum which the plaintiff would have to lay out in putting the land in good order.—*Halse Bros.* vs. *English County Colonization Association* 14

Where a contract of lease was entered into and part of the contract was that certain permanent improvements should be erected on the land leased, and subsequently an association who had taken over all the rights and liabilities of the lessee under the original contract agreed to take the land on lease for three years, and at the end of one year broke this agreement and handed back the land: *Held*, that the association were not entitled to set off against the damage suffered by the lessor the

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benefit which he received from these permanent improvements having been erected on the land.—*Halse Bros.* vs. *English County Colonization Association* 14

2. CONTRACT.—Where H., who had a lease of F.'s farm, met E. and said, "Will you consent to cancel our lease?" and F., three days afterwards meeting H., said to him, "I will take you at your word and cancel the lease," but no further arrangement was come to as to the time and conditions of the cancellation, and H. ended this second interview by declining to cancel at all: *Held*, there was no unconditional offer to cancel on the part of H. which F. could, by accepting, make into a complete contract.—*Hayter* vs. *Ford* 61

3. —— *See* DELIVERY 121

4. —— Where by a contract between plaintiff and defendant, plaintiff was bound to employ defendant as buyer of all stock for his butcher's business, paying him a fixed percentage, and it appeared that on several occasions defendant charged stock to plaintiff at a larger amount than he had actually paid for it, and defendant accounted for this difference in price by saying that on some occasions he had bought the stock for himself and sold it afterwards to plaintiff at market price (there being a clause in the contract empowering him to sell his own stock to plaintiff at market price, and receive the percentage thereon), and that on other occasions he received from the seller one animal as a gift or bonus for himself and then included it at market price with the lot transferred to plaintiff, and it appeared that he did not on these occasions inform plaintiff that he was selling him his own stock, or telling him of the bonus which he had received: *Held*, that defendant's conduct amounted to fraud, and that plaintiff was entitled to have the contract cancelled on that account.—*Moorcroft* vs. *Biddulph* 172

5. —— *See* NATIVE MARRIAGE 136

CONTRIBUTORY NEGLIGENCE. *See* NEGLIGENCE 7

COSTS.—Where a rule *nisi* had been granted calling on respondent to show cause why he should not give security for the payment of a certain debt, and why he should not pay the costs of the application, but the petition on which the rule was granted contained no prayer for costs, the Court, in making the rule absolute, *held* by a majority (BARRY, J.P., *dissent.*) that applicant should be allowed her costs.—*Richardson* vs. *Richardson* 52

2. —— Where M. sued T. in the Magistrate's Court, and obtained provisional judgment, and M., subsequently discovering that the summons under which judgment had been given was irregular, gave notice to T. that he would apply to the Magistrate to have the judgment annulled, and T., notwithstanding this notice, applied under Rule 29 to have the case re-opened, and it was

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re-opened, and the judgment reversed: *Held*, that the Magistrate was wrong in ordering M. to pay T.'s costs in the suit.—*Meintjes* vs. *Theunissen* 55

3. Costs.—Where a summons in the Magistrate's Court claimed payment of a bill of costs due to plaintiff (an attorney) for appearing for defendant on a criminal charge before a police officer, and afterwards before a Magistrate, and defendant excepted on the ground that the bill was furnished in a lump sum and no particulars given, and also that it was untaxed: *Held*, that neither of these exceptions could be maintained.—*Yates* vs. *Elliott* 59

4. —— *See* Appeal 71

5. —— *See* Damages 140

Curator *bonis*.—A Curator *bonis* appointed to a person who through age and physical infirmity was incapable of managing his own affairs, there being no allegation of mental infirmity.—Re *Moorcroft* 101

Damages. *See* Contract 14

2. —— Where plaintiff had agreed to sell 50 sheep and in pursuance of the agreement despatched the sheep to the purchaser, and on their way they were wrongfully stopped by the defendant, who had no knowledge of this agreement, and in consequence they arrived too late to be sold: *Held*, that plaintiff could not recover from defendant damages for the loss of sale, as such damages were too remote.—*Retief* vs. *Groenewald* 140

Dealer in Gunpowder. *See* Licence (2) 82

Dealer in Aerated Water. *See* Licence (5) 167

Delivery.—Where plaintiff sued defendant for payment of his charges for work and labour done in connection with certain bales of wool, and it appeared that defendant was the purchaser from H. L. & Co. of the said wool, stored at the time of sale in the warehouse of the plaintiff, who was paid a fixed sum by H. L. & Co. for storage and other expenses in connection with the wool, and that plaintiff on receiving notice from H. L. & Co. of the sale had entered the wool in his books as received on account of the defendant from H. L. & Co. and sent a corresponding memorandum of the wool so held to H. L. & Co. who gave it to the defendant, and defendant subsequently sent an order to plaintiff to send the wool to wash, and plaintiff in order to do so had the wool re-sewn, marked and loaded on waggons for the defendant: *Held*, that delivery of the wool did not take place till it was actually put on the waggons, and that till then plaintiff was the agent of H. L. & Co. the seller, and not of the purchaser, and that it was as such agent of the seller that he was called on by the defendant to send the wool to wash,

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and that consequently all work done in respect of the wool before its delivery on the waggons was part of plaintiff's original contract with the seller, and that he was not entitled to make a further charge against the purchaser for such work.—*Court* vs. *Mosenthal & Co.* 121

DIVISIONAL COUNCIL. *See* SERVITUDE 1

2. —— *See* VALUATION 30

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IMPROVEMENTS. *See* CONTRACT (1) 14

INJURY BY DOG. *See* SUMMONS (2) 88

INTERDICT. *See* RIGHT OF SHOOTING 153

JURISDICTION.—Where in the Magistrate's Court defendant set up a counterclaim alleging that in a certain transaction he had given plaintiff a promissory note for £44 as security for whatever debt might be due to plaintiff, and that, as only £8 14*s.* had proved to be due, £35 6*s.* was now due and payable to him by plaintiff, and took exception that owing to the amount of this counterclaim the Magistrate's jurisdiction was ousted, but the Magistrate, after hearing evidence, decided that the promissory note was given, not as security, but as a final settlement, and consequently dismissed the exception: *Held*, that there was a *bonâ fide* counterclaim set up in excess of the Magistrate's jurisdiction and that the exception must be allowed.—*Bosch* vs. *Van der Heever* 91

2. —— Although by Act 30 of 1889, *s.* 1, special Justices of the Peace have jurisdiction to try offences under the Masters and Servants Act, they have no power to try cases of breach of contract between masters and servants when such cases do not constitute an offence.—*Queen* vs. *Wentworth* 94

JUSTIFICATION. *See* LIBEL 47

LIBEL.—Where plaintiff, in an action for libel, had previously sued B. for damages for seduction, and in this action had given evidence of the seduction, and had admitted having subsequently married without informing her intended husband of the seduction, and B.'s father, afterwards writing to a newspaper, described her as a characterless woman: *Held*, in an action for libel brought by plaintiff against him, that this was a fair comment on her conduct.—*Roux* vs. *Lombard* 47

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Where plaintiff in a libel action had previously brought an action for seduction and defendant shortly afterwards in the public press commented on the seduction case and on plaintiff's character as disclosed by her evidence in it: *Held*, that plaintiff, having made the facts referred to public, so as to invite comment on them, could not recover damages on account of defendant's repetition of these facts, even if it was not shown to be for the public interest.—*Roux* vs. *Lombard* 47

LICENCE.—A conviction for selling liquor without having a licence set aside, where the sole evidence of the sale was that of a trap, and the circumstances were such as to render this evidence unreliable.—*Queen* vs. *Mahlameni* 9

2. —— Fireworks as explosives are included in the term gunpowder, and any one selling them without having a licence as a dealer in gunpowder is guilty of contravening s. 6 Act 13 of 1870.—*Queen* vs. *Friedrich* 82

3. —— Where a summons charged accused with wrongfully and unlawfully carrying on the trade of a general dealer by exposing for sale merchandise, and omitted to add the words "without having the particular licence in that behalf required": *Held*, that this omission was fatal to the summons and that the conviction of accused must be quashed.—*Queen* vs. *Behrenstein* 109

4. —— Where accused was convicted of buying ostrich feathers for the purpose of trade without having a licence, and it appeared from the evidence that accused had no licence himself, but was buying as agent for N., who had a licence, and that he was regularly employed as produce buyer by N.: *Held*, that he as agent was protected by N.'s licence and that consequently the conviction was wrong.—*Queen* vs. *Botha* 150

5. —— In a charge under s. 6 Act 13 of 1870 of exercising the trade of a dealer in aerated water and cigars without having previously taken out the licence required by law, it is necessary to set forth the particulars of the Act or Acts relied on as amounting to the exercise of the trade.—*Queen* vs. *Parkins* .. 167

Per SOLOMON, J.: Where accused was charged with exercising the trade of a dealer in aerated waters without having a licence, and the evidence showed that on being asked by the inspector of licences to sell soda-water, he said he had none, but on the inspector refusing to credit this and threatening to search the premises he produced one bottle of soda-water which the inspector purchased, and there was nothing to show there was any other soda-water on the premises: *Held*, that the evidence was insufficient to prove the exercise of the trade.—*Ibid.*

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LOCATION.—Natives occupying a farm under the provisions of a will which gives them a right of occupation or ownership in the farm are not occupants in the sense required to constitute a location under the Native Location Act.—*Queen* vs. *Rensburg and Others* 38

Semble.—The fact of natives working on the halves with the proprietor of a farm does not entitle them to be held to be in his *bonâ fide* and continuous employment, so as to be allowed to live on his farm without constituting a location.—*Ibid.*

LUNATIC.—Where a magistrate before whom a prisoner is tried returns a special verdict in accordance with s. 12, Act 35 of 1891, that the accused committed the act charged against him, but was insane at the time he did so, he ought then to order the accused to be kept in custody as a criminal lunatic till the Governor's pleasure shall be known, and ought not to issue a summary reception order under s. 27, which only applies to the case of non-criminal lunatics.—*Re Nontambe* 92

Notwithstanding the definition in s. 3 of the Act 35 of 1891, Court must be taken for the purposes of the Act to include Courts of Resident Magistrate.—*Ibid.*

MAGISTRATE'S COURT. *See* SUMMONS 34

2. —— *See* COSTS (2) 55

3. —— *See* COSTS (3) 59

4. —— See JURISDICTION (1) 91

MASTERS AND SERVANTS ACT. *See* JURISDICTION (2) 94

MUNICIPALITY.—Where a Town Council in making up its valuation roll entered one member of a firm as the owner of certain property instead of the firm who were the real owners, and after the one member of the firm so entered had become insolvent the Council sued the occupier of the premises for the rates falling due during his time of occupancy: *Held*, that this mistake in the valuation roll did not free the occupier from his liability to pay the rates.—*Grahamstown Town Council* vs. *Jordan* 116

NATIVE LOCATION. *See* LOCATION 36

——— MARRIAGE.—Where plaintiff claimed back cattle paid to the defendant as dowry, on the ground that the girl for whom the dowry cattle were paid had by her conduct broken the contract as to marriage: *Held*, that as the marriage contracted for was one according to Kafir custom only, between natives residing in Cape Colony, no action for the recovery of the cattle would lie.—*Matshoba* vs. *Klaas* 135

NEGLIGENCE.—Where defendant was in the habit of allowing his horses to remain with harness on, but without bridle or halter, loose in a yard open to the street, and one horse so left loose suddenly bolted through an unused door from the yard into

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an unfrequented lane and thence into the main street, and there collided with and upset a cart in which plaintiff was driving: *Held*, that defendant was guilty of negligence and was liable to plaintiff for damages for the injuries he had received in consequence of being thrown out of the cart.—*Wiblin* vs. *Webber* 71

NUISANCE. *See* ULTRA VIRES 113

OBSTRUCTING POLICE. *See* POLICE OFFENCES 98

OSTRICH FEATHERS. *See* LICENCE (4) 150

OUTSPAN. *See* SERVITUDE 1

POLICE OFFENCES.—Where prisoners were charged with hindering or disturbing the police in the execution of their duty, and the evidence showed that they had met two policemen in uniform on the road and had assaulted and driven them away, but did not show that they knew on what particular duty the police were engaged, or that they were informed or had any direct knowledge that they were on duty at all: *Held*, that no knowledge that the police were on duty could be inferred from all the circumstances, and that the Magistrate was justified in convicting.—*Queen* vs. *Mdani and Others* 98

PROCEDURE. *See* SUMMONS (1) 34

2. —— *See* LUNATIC 42

3. —— *See* COSTS (1) 52

4. —— *See* APPEAL (2) 98

PUBLIC HOLIDAY. *See* SUMMONS (1) 34

PUBLIC INTEREST. *See* LIBEL 47

RATES. *See* MUNICIPALITY 116

REMOTENESS OF DAMAGES. *See* DAMAGES (2) 140

REVIEW. *See* VALUATION 30

RIGHT OF SHOOTING.—Where plaintiff had acquired for a term of years the exclusive right of hunting, shooting, &c., over defendants' farm, which was 400 morgen in extent, and had on it a hotel, and had at his own expense laid down a number of pheasants and partridges and now asked for an interdict restraining defendant from laying down a race-course on the farm and holding quarterly race-meetings, and it appeared that the course was laid down on a portion of the farm unsuitable to game, and the evidence as to the disturbance of game by the one race-meeting already held was weak and conflicting: *Held*, that there was nothing to show that the inevitable consequence of making the race-course and holding races must be to disturb the game permanently, and that plaintiff had not proved that any damage had actually been suffered, and that consequently the interdict must be refused.—*O'Brien* vs. *Hansen & Schrader* 153

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Per SOLOMON J.: Where there is a lease of the shooting rights over a property, the owner of the property is not thereby precluded from managing it in the ordinary way and improving it, even if in so doing he interferes seriously with the shooting; if, however, the owner deals with it in an extraordinary and unusual manner, if this involves substantial damage to the shooting the lessee has a right to an interdict.—*O'Brien* vs. *Hansen and Schrader* 153

RULE OF COURT 29. *See* COSTS (2) 55

SALE OF LIQUOR. *See* LICENCE (1) 9

SALE OF WOOL. *See* DELIVERY 121

SCAB ACT.—Sect. 9 of the Scab Act, which makes it an offence to refuse to allow any inspector to enter upon any land to examine sheep or to hinder any such inspector from examining such sheep, does not apply to assistant inspectors, and it is only when accompanying an inspector or in the absence from any field-cornetcy of the inspector, that an assistant, thereto authorised by the chief inspector, has the right of entering upon premises conferred upon such inspector.—*Queen* vs. *Loots* .. 102

SERVITUDE.—Where a grant of land contains a clause providing "that all roads and thoroughfares running over the land shall remain free and uninterrupted as well as the outspan place laid down on the diagram," this merely reserves a servitude of outspan in favour of the travelling public, and does not vest the ownership of the outspan in the Government or their successors the Divisional Council. The owner of property who has granted a servitude of outspan of this description on it retains the right of grazing his own stock on the outspan at all times, provided he leaves sufficient pasturage for the use of the person or persons in whose favour the outspan is granted.—*Divisional Council of Albany* vs. *Lombard and Others.* 1

SHOOTING LEASE. *See* RIGHT OF SHOOTING 153

SPECIAL J.P. *See* JURISDICTION 94

SUMMONS.—Where a summons in the Magistrate's Court is returnable on a day that is a public holiday, the Magistrate should try the case on the following day.—*Stuurman* vs. *Wilson* .. 34

Where a Magistrate heard a suit, the summons in which had been made returnable on Easter Monday, on the next day fixed for the hearing of civil cases in Magistrates' Courts, namely, Thursday in the same week, and gave judgment against defendant, who was in default: *Held*, that the summons had expired, and that the judgment and subsequent proceedings must be set aside.—*Ibid.*

2. —— Where a summons in the Magistrate's Court set forth that six dogs, the property of defendant and others, had trespassed on plaintiff's farm and killed five ostriches valued at £65, and

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the summons claimed from defendant £20 as damages, and the defendant excepted owing to its vagueness and the non-joinder of the other owners of the dogs as defendants: *Held*, that the exception ought not to have been sustained.—*Bartlett* vs. *Willimore* 88

3. SUMMONS. *See* LICENCE (5) 167

TAXATION. *See* COSTS (3) 59

TRAP. *See* LICENCE (1) 9

TRESPASS.—Where plaintiff was in occupation of defendant's huts under no agreement of lease, and had received notice to quit and had refused to do so, and defendant consequently removed plaintiff's furniture from the huts and set fire to the huts without injuring any of plaintiff's property: *Held*, that plaintiff could not recover damages for trespass or wrongful ejectment. —*Futchani* vs. *Kretchman* 83

ULTRA VIRES.—By Act 29 of 1881 a Village Management Board may make regulations to provide for the prevention, removal or abatement of all nuisances which may tend to injure the health, destroy the comfort, or affect the rights of the inhabitants: *Held*, that a regulation that "no person shall be allowed to slaughter any animals, except at such place or places as shall be set aside for that purpose by the Board, except pigs, poultry, &c." was *ultra vires* of the Act.—*Gregg* vs. *Cambridge Village Management Board* 113

VALUATION.—Where a Divisional Council had valued certain property and the occupier and lessee had appeared at the subsequent Court of the Divisional Council, and had objected to this valuation on the ground that the property did not belong to the persons described on the roll as its owners, and his objection had been overruled, the Court refused an application to review this decision on the ground that the owner, who was the only person aggrieved, was not a party to it.—*Kowie Railway Syndicate* vs. *Bathurst Divisional Council* 30

Semble.—Notwithstanding the provisions of s. 264 Act 40 of 1889 the Court will review a decision of the Court of Divisional Council if any irregularity of proceedings be alleged, and the fact that this Court has confirmed a valuation of property already rated or not liable to be rated at all is an irregularity sufficient to make its decision liable to review.

VILLAGE MANAGEMENT BOARD. *See* ULTRA VIRES 113

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